

# AMERICAN LABOR AND THE GOVERNMENT

*by*

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To  
My Parents



## PREFACE

The author is of the opinion that government controls will continue to play an important role in the attempts of labor and management to find satisfactory solutions to the labor problems that they face. This book is an attempt to present briefly and in non-legalistic terminology information on laws, court actions, and government policies that affect the policies and actions of workers and employers in their relationships to each other.

The volume is far from encyclopedic; in order to cut it to the desired size, some subjects had to be omitted and others treated very briefly. Probably no two persons would agree as to what subjects should be covered and the extent of discussion on each. The allocation of space herein indicates the author's opinion as to the relative importance of the various subjects. Although not a necessity, some knowledge of labor problems would make the reading of this work simpler.

A number of persons have helped in the preparation of the manuscript. My first debt is to my wife, Cornelia Y. Miller, who helped at all stages with both content and the presentation of the material. Dr. H. F. Underhill of Indiana University read the entire manuscript, as did Dr. Melvin J. Segal of Michigan State College and Mr. Robert Aronson of the Graduate College, Princeton University. All of these persons offered numerous, thought-provoking, and helpful suggestions; I am grateful for that help. Much of the value of this work is attributable to their aid; any errors of omission or commission are solely the responsibility of the author.

GLENN W. MILLER



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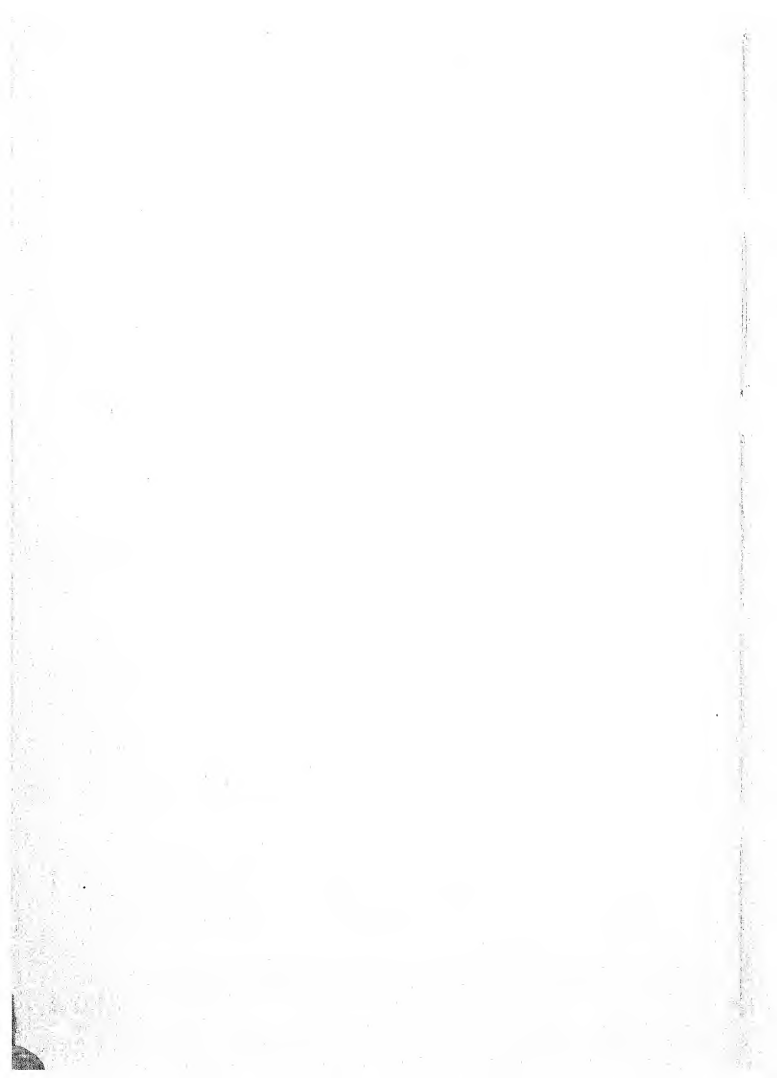
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**American Labor and  
the Government**



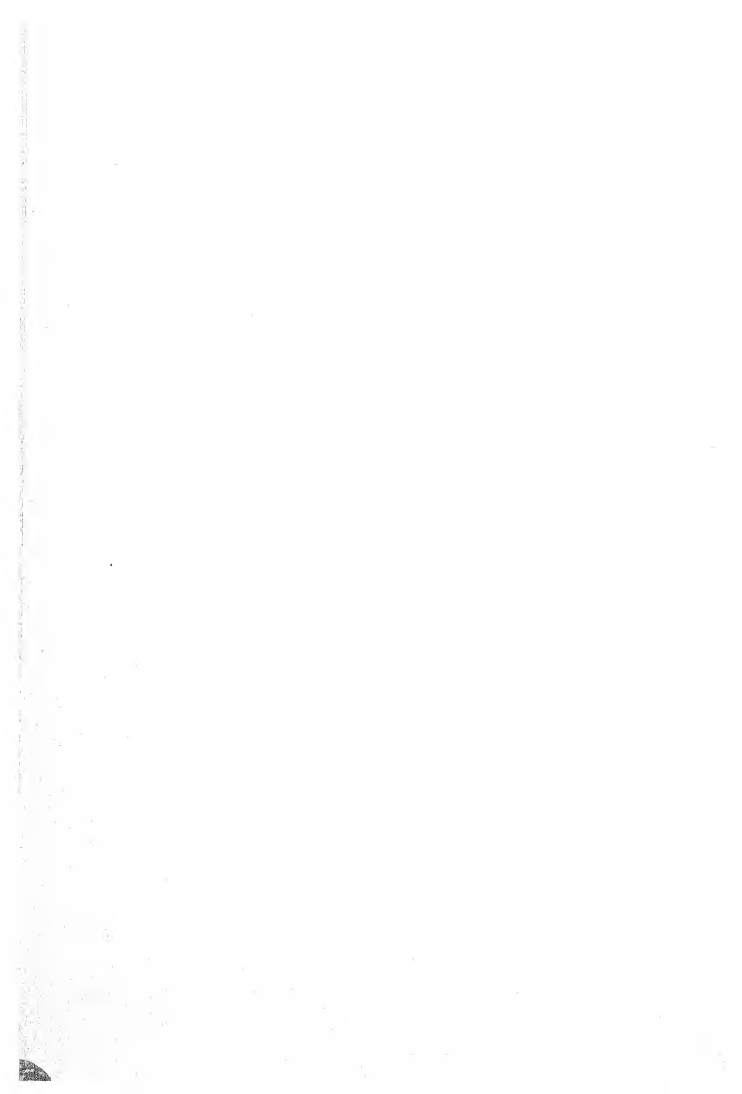
## PART I

### INTRODUCTION

In a study of labor controls in the United States it is unwise to begin with a discussion of existing legislation and court and administrative attitudes. Some knowledge of the background out of which current practices grew is necessary if one is to understand developments of recent years. The purpose of the nine chapters included in the first part of this work is to sketch the purpose and functions of government controls of labor, the manner in which they may be exercised, and the early groping and experimentation in search of controls that would help to meet adequately the labor problems arising in our dynamic economy.

A convenient chronological boundary line for the discussion of background material is the first World War. By the time of that conflict, the forerunners of most present-day controls had appeared; yet none of them had reached their present form. A second reason for the division is that the events of the war, as of every major war, were such as to bring sharp changes in government policies toward labor's problems and attitudes.

This discussion points out briefly the developing labor problems that made government controls necessary and the early experiments in exerting guidance over economic behavior. Similarly, the constitutional and judicial environment in which these controls developed is of interest and must be noted briefly. The great majority of the early laws and court attitudes were modified between the two wars, and gradually approached the current situation. Part I, therefore, is designed as a basis from which to launch a study of current labor controls.



## CHAPTER I

# THE FUNCTION OF GOVERNMENT CONTROL IN LABOR RELATIONS

### Labor problems and attempted solutions

Wherever people work for a living, labor problems will arise out of the job relationship of employers and workers. Labor problems develop from irritating job situations, for which workers or employers or the representatives of each cannot find a mutually satisfactory solution. In many instances, labor and management find themselves in conflict over the allocation of the joint product that each is to receive, over hours of work, hiring and layoff practices, seniority policies, dispute-settling procedures, and many other points.<sup>1</sup> Such conflicts do not mean that employers and workers cannot work together effectively; their existence does mean that there will be many differences, arising from these divergent interests and points of view, that may tax the abilities of both factions and sometimes those of appropriate agencies of government before arrival at solutions that are acceptable to both of the parties directly concerned and to the public.

Although problems will arise wherever people work, the relative importance and complexity of individual issues varies with different industries, phases of the business cycle, geographical locations, types of economy, and other factors. For example, seasonality of unemployment is more pronounced in construction than in retail food distribution; unemployment is a serious problem during a depression but almost non-existent in a period of war prosperity; and economic insecurities such as unemployment or dependent old age are perplexing problems in a capitalistic society but may be less troublesome in a governmentally controlled economy. Again, the labor problems that plague an agricultural economy will give way with industrialization to different but probably more complex problems.

Thus, at any time, and in any economy, there arise a diversity of irritating situations that have been termed labor problems. In an

<sup>1</sup> For extensive discussions of labor problems see: Daugherty, C. R., *Labor Problems in American Industry*, Chs. I through IX. Boston: Houghton Mifflin Co., 1941; Taft, P., *Economics and Problems of Labor*. Harrisburg: Stackpole and Sons, 1942; Millis, H. A. and Montgomery, R. E., *Labor's Progress and Some Basic Labor Problems* (Vol. I of the three-volume series entitled *Economics of Labor*, hereinafter cited as Millis and Montgomery, Vol. I). New York: McGraw-Hill Book Co., Inc., 1938.



economy with a large degree of individual freedom, there are three approaches to a solution for these problems. Employers, working alone or in groups, try to promote solutions that are to their liking and in their best interests. Workers, often acting as a group through their unions, urge action to their liking. Very frequently, the two directly interested groups are in conflict; if they cannot reach a solution or if they reach a socially undesirable one, it is the necessary and proper function of government—federal, state, or local—to take steps necessary to protect the interests of the public and the economically weak groups in society.

It is the purpose of this volume to examine the nature of, the principles underlying, and the limitations on governmental intervention in the field of labor relations. However, before turning to this subject, it is necessary to note the basic assumptions on which the treatment rests and examine briefly the interests of workers and employers and the conflicts that arise between them.

The basic assumptions on which the following discussion is founded are:

1. The present type of government, although not perfect, will continue in the United States, and under it the protection of certain constitutional rights of individuals and the continuation or increase of the responsibility of government to the people will be paramount aims.

2. A "free enterprise," profit-motivated, economic system will continue. However, under a system of free enterprise there is need for some government restrictions to protect public interest, as in the regulation or prevention of monopoly. In some instances, such measures may not sufficiently protect public interest, and provision by the government of certain essential services, such as postal service or police or fire protection, may be necessary. Therefore, "free enterprise" should be considered to be a relative term that does not preclude government controls or services provided by the government, but does assume that these be kept at the minimum compatible with public welfare.<sup>2</sup>

The attitude and interests of labor center around the fact that the workers' well-being is closely tied-up with the sale of their one marketable resource, labor power. To complicate the problem of labor relations, the labor power of the worker is inextricably tied-up with his everyday life. He cannot sell his labor without selling a part of his life as well. For that reason, the conditions under which work

<sup>2</sup> Similarly, a free enterprise economy implies relatively equal power of business competitors, labor, management, or consumer groups to protect their economic interests. In reality, the relative power of different businessmen and of organized labor, as contrasted with unorganized, varies widely. Equal economic power, like the absence of government control, is more of a theory than a fact.

is performed are important. For example, poorly lighted, heated, or cleaned work places, inadequate provisions for eating, antagonistic attitudes and practices of supervisors toward unionization, or insufficient worker participation in determination of policy may bring unrest, high turnover, low output, and the like—in other words, labor problems. Thus it is that working conditions are very important to workers, to employers, and to the public. And thus it is that much space is devoted in union agreements and in state and federal legislation to the establishment of satisfactory conditions of work.

Probably more important to workers than the physical conditions under which the job is done is the price at which labor is sold. There is an almost continuous pressure on the part of workers for higher wage rates. In the opinion of workers, higher wage rates mean better living and the possibility of savings to provide an economic cushion for the time when sickness or other unexpected emergencies arise. It does not worry the average worker that economists cannot agree on whether higher wages, working through increased demand for goods, mean a higher level of economic activity or, on the other hand, through the causing of higher costs and higher prices, more danger of economic collapse. To the worker, in the short run at least, higher wage rates are almost universally desirable. Since the demands of workers and unions are usually in excess of the amount employers are willing to pay, the subject of wages consumes much time in union-employer discussions and occupies an important place in every union agreement. Here, again, government intervention, in the form of controls of wage rates to be paid, has become very important.

There is another basic factor to be noted in trying to understand the attitude and policies of labor, organized and unorganized. An ever-present fear and disturbing condition is the insecurity of the average worker.<sup>3</sup> This insecurity may be uncertainty of a steady job, physical risks involved in the work, the prospect of dependent old age, or a combination of a number of these elements. Much of the philosophy of labor, especially organized labor, can be traced to the omnipresent consciousness of insecurity. High wage rates offer an opportunity of savings, home ownership, and similar factors that may mean more security. Seniority provisions offer a greater degree of job security to older workers. Shorter hours of work are thought to provide a thinner spreading of the available work, thus combating unemployment. Restrictive rules applying to apprenticeship or union admission are methods of keeping the supply of union men in a favorable relationship to the jobs that are anticipated.

<sup>3</sup> Commons, J. R., *Legal Foundations of Capitalism*, p. 304. New York: The Macmillan Co., 1924.

The desire for safer working conditions is another manifestation of the same fear, although it is directed toward a different type of insecurity; so also is the general support by workers of social security legislation, providing a measure of governmental aid for periods of unemployment and for dependent old age. Probably no one factor is so important to an understanding of much of the attitude of workers as is that of the insecure position which they feel is theirs. To understand the frequently adamant stand taken by a union on some point at issue with an employer, worker insecurity, one of the outstanding characteristics of our capitalistic economy, must be kept in mind.

Accompanying these drives and interests that influence the general attitude of labor is the assumption of many workers and most union leaders that their interests are in conflict at many points with those of management. Workers are of the opinion that their interests and desires are not those of management, that they often will prove unacceptable to owners or managers. This attitude is implicit in the very existence of labor unions. Organizations of workers are formed to force consideration of demands even when there is opposition to the union position. Such a philosophy is not new; it showed itself in the form of unions before the start of the nineteenth century. That the aims pursued by unions were in some respects in conflict with those of employers was shown in employer appeals to the courts for assistance and in court rulings of the early nineteenth century holding union action to be a conspiracy to harm employers.<sup>4</sup> The same philosophy was stated by the Supreme Court prior to 1900. In *Holden v. Hardy*<sup>5</sup> the court held, in supporting certain state labor legislation, that the interests of "proprietors" and "operatives" were "to a certain extent, conflicting."

Coupled with the assumption of a conflict of basic interests is the realization that the bargaining power of workers acting as individuals is not equal to that of employers. This fact is especially true as mass-production industry brings larger and larger establishments in which the individual worker becomes of relatively smaller importance to the employer. Large scale business organization and the frequent occurrence of absentee ownership create a gap between owners and workers so that there is less chance of a mutual understanding of the problems that each faces. In addition, with the gradual decrease in the skill of the worker as jobs are broken down and machine methods and simple manual operations developed to replace more highly skilled manual operations, the worker has less to distinguish himself. The more highly skilled or trained a worker

<sup>4</sup> See below, Ch. VI.

<sup>5</sup> 169 U. S. 366 (1898). See below, Ch. XI.

is and the smaller the size of the plant, the more individual bargaining power he enjoys. This assumption of unequal bargaining power underlies the organization of labor unions. A group acting as a unit has power, but a similar number of individuals acting separately has little coercive ability.

The interests and attitudes of employers are frequently in sharp conflict with those of workers. To employers, labor is one of the factors of production which they must combine with others to produce a salable product. The end goal is sale of the product at a profit, and low wages per unit of product are a means toward that end.<sup>6</sup> Because high wage rates are so important to the worker,<sup>7</sup> much conflict emerges over this issue. Employers in search of a low labor cost per unit of output desire a low wage, or, if forced to pay relatively high wages, a high level of output. To a considerable extent employers are inconsistent with their own practices when they expect high-level production from workers. Since a limited amount of product may offer the greatest profit, employers may find high production by limited numbers of workers more desirable than full-scale output.<sup>8</sup>

Although the division of the joint product, that is, determining the amount that goes into wages and into the return to management and ownership, is the most common and highly publicized point of conflict between labor and management, there are many other irritating issues. Such questions as hours of work (clearly related to earnings), seniority policies, methods of settling grievances, and numerous other problems arise from time to time to show the frequent divergence of labor's and management's aims.

Many of the conflicts that develop under a capitalistic economy arise out of the fact that workers or employers or frequently both are subject to economic forces beyond their control. For example, cyclical fluctuations are a force too large to be controlled by an employer. In trying to run a business during a depression period, the policies followed may bring up problems such as the adjustment of wage rates, spreading of work, or policy to be followed in layoffs and rehiring. During such a period, unions will be urging their policies in matters such as the above and also trying to maintain their membership and protect their members' interests, while employers will be trying at the same time to maintain profits, if possible, and if not,

<sup>6</sup> Veblen, T., *The Theory of Business Enterprise*, p. 62. New York: C. Scribner's Sons, 1927.

<sup>7</sup> Probably the level of wage rates is overemphasized by both organized and unorganized workers. This is due in part to the difficulty of controlling steadiness of work and price levels and in part to a rather narrow point of view of the relative significance of the rate of monetary income.

<sup>8</sup> Commons, J. R., *op. cit.*, p. 306.

to minimize losses. Conflicts may ensue over the action that should be taken, but it may be that neither party is directly responsible for the problems at hand.

#### The reasons for government intervention

It is clear from observation that the differences in the aims of workers and employers are so numerous and basic that a strict *laissez faire* policy on the part of government is not practical. With conflicts inescapable and where one of the contestants is markedly weaker than the other, the weaker may be faced with a "take it or leave it" choice. In the past, and in many employments at the present time, this has meant that worker groups have been at a disadvantage. With the relatively strong development of unions in some industries the reverse situation is now and then found to be true. Whatever the relative bargaining power of the parties to the labor contract, it is necessary for government to provide protection for the weaker.<sup>9</sup>

The position taken above is in conflict with the frequently voiced opinion that industry will, if left alone, conduct its affairs in a socially desirable manner. Neither the inherent benevolence of management nor the regulatory hand of competition brings socially desirable practices on a widespread scale. It is clear that a balancing of the bargaining power of labor and management by means of labor organizations or the intervention of government is necessary to control the action of many employers and make it conform to socially desirable standards.<sup>10</sup> The situation also develops, on occasion, that a well-organized and powerful union acts in an anti-social manner. While many of the restrictive practices of unions can be understood and some can be defended, when the power of a union is used anti-socially it should be controlled as is that of any other group.

Even when bargaining power is relatively equal, government intervention may be needed. The struggle between two equally powerful organizations of labor and business may cause public hardship. A long and bitterly contested labor-management dispute may disrupt or stop production of necessary or highly desirable commodities. Even though the dispute is finally settled on a somewhat equitable basis, the public, labor, and management may have suffered unnecessary losses. Here, again, government intervention is socially desirable.

Thus the justification for the evolution of a body of government controls in the field of labor rests on the assumption that *laissez faire* in economic relations frequently does not result in the greatest

<sup>9</sup> *Holden v. Hardy*, 169 U. S. 366 (1898).

<sup>10</sup> For a similar opinion see: Taft, P., *op. cit.*, p. 23.

social good. Rather it results in exploitation of the weak by the strong or in costly strife that is harmful to workers, employers, and that vaguely defined body called the public. If these unsocial results be the product of labor disputes, it is the duty of government to do everything in its power to remove the conditions giving rise to labor-management friction and encourage settlement of disputes. However, for government to forbid strikes or other overt forms of labor disputes is not compatible with our democratic form of government,<sup>11</sup> unless the prohibition is accompanied by provisions that will ensure more just solution of employer-employee problems that can no longer be settled by a test of bargaining strength. Even if such a policy were to be embarked upon, it would be defensible only in those instances where a work stoppage would cause immediate hardship to the public, as would be the case if public utility or hospital employees were to stop work. Government machinery to function in appeal cases would be difficult to establish and its functioning might well be unsatisfactory. Any departure from freedom of the right to strike is a threat to our way of life, although sufficient irresponsible action may make such a step necessary.<sup>12</sup>

The entire basis of government labor controls can be seen to rest on a denial of the social efficacy of *laissez faire*. If that theory of government relationship to economic life is denied, the question arises of how far to travel the road of government control, and in what direction. How much control can be exerted on economic life while still retaining a basically free enterprise, capitalistic economy? Every control that is enacted to limit or direct the free action of business or labor is a step away from our eulogized free economy. However, a certain amount, perhaps an increasing amount, of control is inescapable in the interest of public well-being. There is no clear line of demarcation between the field of permissible control and the area that must be left for free economic action. The division that is generally acceptable now is not the same as might have been acceptable twenty, or fifty, or one hundred years ago. And changing economic and social conditions will bring changes in public attitudes that may sanction an entirely different division of fields of action at some future date. There are, therefore, no set areas of government control and free private action that are permanent in any way.

The most important questions regarding governmental economic controls are whether they are directed at promoting social well-being and whether they are compatible with a democratic society. For almost any control measure, some parties insist that the traditions of

<sup>11</sup> Witte, E. E., in preface to Kaltenborn, H. S., *Governmental Adjustment of Labor Disputes*. Chicago: The Foundation Press, Inc., 1943.

<sup>12</sup> See below, Ch. XXVI.

the American type of economy, that is, a profit-motivated, privately owned and operated capitalism, are being violated. The fact remains that government enactments curbing the predatory activities of individuals by limiting the freedom of some to act as they choose offer to economically weak groups more freedom than they otherwise could realize. Complete equality before the law is not compatible with effective democracy. Some persons or groups have more bargaining power and ability to pursue their own interests than others. Equitable treatment may demand that the powerful be subjected to controls that will protect the weaker when there are conflicts of interest. Equal treatment before the law might prove to be markedly inequitable treatment. Judicious use of controls to protect or help the weak and inept, on the other hand, is requisite to effective democracy among groups of individuals with different degrees of intelligence and of social and economic power.

It must be recognized that government controls do not affect all persons similarly, for controls in most cases do not specify action or behavior that all persons must follow. Rather, minimum standards of behavior are set and persons are free to do as much better than the minimum as they choose. A minimum-wage law, for example, setting a forty-cent minimum per hour simply specifies that wages of less than forty cents cannot be paid, but any rate above that may be paid; any employer paying more than the minimum loses none of his liberty thereby, but one desiring to pay less than the minimum is denied that freedom. Again, a law requiring that employers bargain collectively with representatives of their workers does not affect the person who is already bargaining with his workers. Government controls thus affect adversely only those persons whose behavior is below the standards set. It is the person whose actions are below a socially desirable par that suffers; it is surprising that so many tears are shed on his behalf.

The above must not be taken as implication that all government labor controls are socially desirable or in the best interest of labor. In fact, as will be seen from subsequent chapters, the bulk of legislation favorable to labor and tending to control employers' action has come since 1930. Prior to that time, the absence of labor legislation and the application to labor of enactments not intended as labor laws were harmful to the interests of workers. In many cases the force of public opinion and the pressure of business groups was sufficient to make the controls contrary to the interests of labor and to build in the minds of many union leaders a long-standing distrust of government controls.<sup>13</sup> The application of the anti-trust laws to labor unions is a pertinent example.

The view has been taken above that government actions are neces-

<sup>13</sup> See below, Chs. VI and VII.

sary to protect public interest or the weaker party where direct negotiations fail to bring socially desirable solutions to labor problems. But what are the functions which government action should perform? What are the maladjustments for which solutions will most likely be needed from time to time? One need is the establishment of minimum standards of wages, hours, and conditions of work. Without standards being set to specify minima, many wage rates will be far below the figure requisite for adequate family support, even with full-time work. Moreover, if wages are not adequate for family support, the public, through charity, government relief, high rates of illness, unrest and dissatisfaction, crime, and so forth, will be burdened. In the past, even into the 1930's, the hours of work required have been longer than an equitable distribution of work, health conditions, or citizenship and family obligations would permit. Also, safety and health and other conditions on the job are often unreasonably low when minimum standards are not required. Such standards probably will be of little direct benefit to unionized or highly skilled workers in our economy, since they have sufficient bargaining power to guard their own interests. But for those whose skills or ability or organization do not give them the bargaining power necessary to protect their own interests controls are necessary. Also for the public, which will suffer from the results of unduly low wages, long hours, or unhealthful working conditions, government intervention is imperative.

Controls are also necessary to protect the economically weak. Women and children have held, traditionally, a relatively weak bargaining position. This fact has played an important part in the willingness of legislators to enact protective legislation on matters like wages and hours for women and children long before they were willing to extend similar protection to men.<sup>14</sup> Women and children have been in a weak bargaining position for at least two reasons. They are usually employed in relatively unskilled jobs and they have generally been outside of unions, sometimes by preference and sometimes because of union policy.<sup>15</sup> For women, still a third factor

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<sup>14</sup> Other factors have aided in bringing about this differential treatment. The subsequent moral and physical effects of employment of children at low wages and for long hours and the moral problems as well as the influence on future motherhood of employing women under such conditions played an important part.

<sup>15</sup> While women are still found in trade unions much less often than men, the situation is changing. It has been estimated that in 1910 women comprised nearly 21 per cent of the labor force and less than four per cent of union membership. By 1944 women made up nearly 35 per cent of the labor force, and nearly 22 per cent of union membership. Stated differently, in 1910 seven out of every 100 men in the labor force and only one woman out of every 100 women in the labor force were members of unions. By 1944 these figures had grown to 30 and 16, respectively. See: Dickason, Gladys, "Women in Labor Unions." *The Annals of The American Academy of Political and Social Science*, May, 1947, Vol. 251, p. 70 ff.



may be worth noting; many of them look upon gainful employment as temporary, a prelude to marriage, or to tide the family over some financial difficulty. If a job is temporary, there is less incentive to be a hard bargainer.

Generally speaking, the unskilled are the workers who have least bargaining power, since their duties are not such as to distinguish them or make it important that any one or any group be kept because of special skill or ability. In addition, in the past the unskilled also have been, in most industries, the less effectively organized.<sup>10</sup> For these reasons they will need protective legislation more than skilled workers. Such workers may need at least two types of government help and protection: first, wage and hour controls, and second, laws establishing minimum standards of employment. In addition, they needed in the past protection of their right to organize to protect or promote their own interests. Many employers have objected or still do object to organizations of their workers. Without intervention by the government, many persons who were most in need of organization found it impossible to associate in unions with other workmen. There are good reasons to believe that without government protection of the right to organize there would still be, today, many unable to join unions freely. Even with the strong protection in the National Labor Relations Act, many were not allowed free choice in joining unions.

The question may arise as to whether or not intervention guaranteeing to weaker persons or groups that which they could not gain unaided violates the rights of the economically stronger who are forbidden to do as much for themselves as they could do without controls. Probably it is true that the bulk of government labor controls appearing between 1930 and 1945 tended to establish protections for the economically weak. But in a democratic society the aim of the government must be to promote the greatest good for the greatest number of people. To protect the rights of one person, or group, at the expense of larger numbers of other persons is not compatible with democratic principles underlying our society. There are, it is true, limits to the extent to which the rights of minority groups can be subordinated, but there is no clear line of demarcation to follow on this question. Moreover, any division that is considered to be justifiable at one time and under given circumstances may, at another time and under other circumstances, be inapplicable.

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<sup>10</sup> Negroes and some other racial minorities are groups that might be given special notice. In general, their work has been largely unskilled and they have been organized in strong unions rather infrequently. Despite these facts, relatively little has been done to offer legislative or administrative protection to them.

### Government controls on collective bargaining

Another function that should be performed through government controls is facilitation of the settlement of disputes between labor and management. It is emphasized, however, that government intervention should not be countenanced unless a dispute cannot be settled by direct collective bargaining; controls should not, and cannot, in a democracy, take the place of direct bargaining between workers and their employers. Governmentally imposed settlements of disputes leave a residue of dissatisfaction and unrest. An excellent example of this fact is the nation's experience with quasi-compulsory dispute settlements during World War II and the widespread labor trouble after the war.

Although arbitrary settlement of disputes by government authority is incompatible with democracy, facilitating the successful conclusion of collective bargaining is highly desirable. It is obvious that industrial disputes are costly both to the disputants and to the public. Therefore, government, which should exist for the benefit of the governed, should take whatever steps are compatible with the maintenance of individual liberties to lessen the number of disputes and to encourage the settlement of those that do occur. For this purpose, however, no one policy will be applicable to all industries at any one time or to one industry at different times. For example, there is no similarity in the public interest involved in work stoppages in a public utility and in a cosmetic factory. Public interest does not demand that the same policy be followed in dealing with disputes in the two types of firms.

Again, it does not seem reasonable to adhere to the same policies with regard to dispute settlement in an emergency that are followed under less pressing circumstances. During both World Wars the policy of our government was, of necessity, much more stringent than preceding policies. Settlement, whether amicable or not, was demanded and in most cases secured.<sup>17</sup> However, when the emergencies ceased, wartime policies became less defensible.

Another reason for government labor controls is to prevent racketeering and other irresponsible activities. Much discussion following World War II centered on the need to curb the irresponsible acts of unions. There is some basis for such argument. The unfortunate fact is, however, that, in the opinion of a majority of the middle and well-to-do classes and of legislators, there is a dual standard of be-

<sup>17</sup> When it is said that a certain economic policy was followed during a war period, it should be kept in mind that the economic disruptions of war will begin before actual hostilities and extend long afterwards. Therefore, statements regarding economic repercussions of war will be applicable over a longer period than that of actual hostilities.

havior. Certain actions by business, such as holding goods for higher prices, are good business practice. However, when workers engage in comparable action and withhold labor for higher wages, much of the public insists that such action is anti-social and should not be allowed. In Professor Commons' words, "Restriction of output is practiced by both, but in one case it seems 'natural' and therefore right, because there is no profit; in the other case, it seems arbitrary and therefore wrong because it places a limit on national wealth."<sup>18</sup>

Despite the fact that there is a dual standard of behavior set, there are many instances of union or employer action that are unjustifiable. The make-work policies of some unions can hardly be justified as anything more than a rather selfish interest in their members only, if the practice is viewed from the standpoint of society as a whole.<sup>19</sup> Likewise, various practices of business cannot be defended.

While government controls are defensible in many instances, the double standard referred to makes such controls dangerous to the organized labor movement. It is so easy for legislators, administrators, and members of the judiciary to put into controls their own economic and social predilections that organized labor has traditionally entertained a strong and abiding mistrust of controls. This has been especially true of the American Federation of Labor and its member unions, whose policies and philosophies were well-set long before the Franklin Roosevelt administration ushered an era of pro-labor legislation by administrators and a hierarchy of courts sympathetic toward the new trend in government controls. Many of the newer unions do not share this point of view. The relatively young member unions of the Congress of Industrial Organizations have leaned heavily on political action and government controls to reach some of their objectives. Whatever the attitude of unions or employer groups, government action to forestall racketeering, and especially selfish action of any relatively small group, is a valid and necessary sphere of control.

#### Government assistance in meeting economic insecurities

A final area of government labor control is the very broad and significant one of helping individuals cope with some of the insecurities

<sup>18</sup> Commons, J. R., *op. cit.*, p. 306.

<sup>19</sup> There are reasons other than purely selfish ones. The insecurities of modern economic life, the introduction of machinery, variations in demand, and other uncertainties that lead to unemployment bring make-work policies in an attempt to lessen the impacts of unemployment on union members. While such policies may be undesirable from the standpoint of society, they are easily understood as an attempt to protect union members against an ill that society has not been able to cope with effectively.

that are so characteristic of our society. Some of these controls are directed at preventing the occurrence of the undesirable situations and others at easing the effects of the insecurity once it is present.

The insecurities that characterize our economy include unemployment, dependent old age, and physical risks of accident or occupational disease. To a considerable extent, they are a product of our economy. Unemployment and much of the dependence of age, for example, would not be problems where goods were produced and disposed of on the basis of a need for goods rather than the profit to be made from the production. On the other hand, in that kind of an economy, other problems, such as the maintenance of individual liberties, might be much more inadequately settled than in our type of economy. Thus, to say that certain problems are a product of a certain type of economy, such as that in which we live, is not to criticize ours as being worse than others nor to imply that the problems found are more numerous or more complex. It only points out the peculiar difficulties that are present or threaten to appear. The problem is to find controls that will lessen or ease the effects of certain insecurities in the economy but through measures that preserve, or change slowly, the basic organization of society. Considerable changes probably will occur over a period of time, but the great advantage is that they will come gradually and with neither violence in their introduction nor repercussions.

If it is correct that the object of economic controls is to eliminate or contribute to a solution of problems without changing the economy basically at any one time, there are limits on the action that can be taken. If a basically capitalistic economy in which the primary drive is profits is to be preserved, we cannot require of business actions that a relatively uncertain economic future will not warrant. For example, it would not be practical to require all employers to provide their workers a guaranteed annual wage. Some industries are relatively stable, but in others there are so many uncertainties beyond the control of the businessman that such a guarantee would be difficult if not impossible of fulfillment. Consequently, much of the legislation that seeks to provide security of income or employment calls for government assistance to private business or for outright government performance. As will be shown later,<sup>20</sup> the attack of the 1930's on unemployment included direct government employment programs, plans to encourage greater private employment, and very strong pressure to encourage the passage by states of unemployment compensation laws financed by employers. A similar mixture of programs can be seen in government policy on many other problems. The unfortunate fact is that usually the government does not

<sup>20</sup> See below, Ch. XVIII.

plan ahead adequately, but rather develops programs piecemeal to meet the most pressing problems.<sup>21</sup> It will be seen that as a result of the fact that government controls are largely a result of pressures exerted by politically minded groups and have been developed piecemeal to meet particular problems, the government control program is quite inadequate in many respects.

Where controls are imposed in an effort to minimize the hardships of certain insecurities the problem of maintaining the basic economy is less complex. While not all programs laid out by government can be effectuated by private businesses without putting an impossible drain on their economic ability, many of them are practicable, especially when all competitors are treated alike.

The opinion has already been stated that it is impracticable to require all employers to provide guaranteed annual wages. The broad extension of such security seems outside the power of individual employers in many industries. However, there is experience to prove that some of the hardship of unemployment can be alleviated in our economy by the widespread development of unemployment compensation. The former measure calls for the elimination of an insecurity, and this seems beyond the ability of business—in so far as entire work forces are concerned; unemployment compensation, however, is not directed at elimination, but rather at the easing of the ill effects of the insecurity.<sup>22</sup> Thus it seems clear that the more we try to eliminate insecurities rather than alleviate them, the more the bases of the economy must be affected. And the more basic the change, the greater the opposition to the change.

#### The areas of government controls: federal

Before beginning an analysis of the background and provisions of current government controls, it is desirable to survey briefly the extent to which controls now apply in the field of labor relations. Many persons feel that social controls of business began very late in the United States and have developed slowly.<sup>23</sup> However, the philosophy of a right to control business activity for the assumed best interests of society showed itself in the levying of tariffs and taxing of state bank notes before the twentieth century. And the passage of the Sherman Anti-Trust Act<sup>24</sup> in 1890 indicated somewhat the

<sup>21</sup> Daugherty, C. R., *op. cit.*, p. 15. Metz, H. W., *Labor Policy of the Federal Government*, p. 7. Washington, D. C.: The Brookings Institution, 1945.

<sup>22</sup> If the amount of unemployment compensation is sufficiently large to allow the recipients to consume more than they would if they depended on charity, savings, and the like, then there would be more demand for goods and a consequent elimination or reduction of unemployment.

<sup>23</sup> For example: Ware, N. J., *Labor in Modern Industrial Society*, p. 439. New York: D. C. Heath and Co., 1935.

<sup>24</sup> See below, Ch. VII.

same policy. These early developments were only the forerunners of a movement that was destined to grow much stronger.

While social controls of business came slowly in the United States, a great number of controls now influence the economy. Probably the days of strict *laissez faire* have always been more of a fable than a fact. Even in the nineteenth century, tariffs and government subsidies were common. *Laissez faire* meant to most pressure groups of the nineteenth century an absence of government controls that would be harmful to business. Legislation or other government policies to aid businessmen, however, were quite compatible with the prevailing theory of government's relation to business. For these reasons, it seems more accurate to say that the day of little or no social control of business is well-past. Nevertheless, the philosophy of "leave business alone and it will put its own house in order" is still very strong. This attitude, coupled with a strong post-World War II swing toward economic conservatism, may become even stronger for short periods, but the trend, if we are to maintain a democratic society, must in the long run be toward more ready acceptance and widespread application of controls that promote the interests of the general public. A policy that respects and protects true economic and political democracy demands a definition of the proper sphere of business activity and the relationship of government to industry sufficiently flexible to change with changing economic conditions and needs.

An examination of current labor legislation will serve to show how far the nation has moved into the area of government control of economic matters. This control is a mixture of federal, state, and local legislation, of administrative policies, and judicial attitudes. Since World War I, federal legislation has assumed especial importance; state legislation has long been more important than local.<sup>25</sup> Because federal legislation has become so important, it will be surveyed first.

Wages and hours are problems that have caused numerous conflicts between workers and their employers. Until the twentieth century the long-standing practice of this nation had been to leave the determination thereof to the contestants. As this policy was gradually abandoned, the states began first to determine minimum wages and maximum hours for women and children, who were deemed less able to care for themselves than were men. Due to numerous weaknesses in such legislation and to adverse court decisions, this narrow coverage on a state-wide basis did not prove to be an adequate type of regulation. Consequently, the federal govern-

<sup>25</sup> Raushenbush, C., and Stein, E., *Labor Cases and Materials*, preface, xiv. New York: F. S. Crofts, 1941.

ment began to experiment with wage controls, at first for children and women, and at a later date for men, women, and children in certain occupations. Early attempts ran afoul of adverse opinions by the Supreme Court, so it was not until 1938 that legislation meeting the approval of a majority of the Court was finally enacted. This approval probably resulted more from a change in the philosophy of the judges of the Supreme Court than from a change in economic conditions or in the content of the legislation.

The right of workers to organize and bargain collectively has been an extremely bitter point of debate in the United States. To a rather large extent, employers and the public have regarded unions and union activity with suspicion. However, with the precedents of labor policy applied in the first World War and of experiments with railway labor policy, the federal government now attempts to guarantee to many millions of workers, if that is their desire, the right to organize and bargain collectively with their employers. Here, again, the earliest attempts at such a guarantee met with judicial disapproval, and even after that hurdle was cleared many workers were exempted.

The fact that labor disputes are numerous and costly is a commonplace. Generally, open disputes with work stoppages are most likely to occur in a period of prosperity, especially one with the economic dislocations of rapidly rising prices and a tight labor market. Although the largest number and most expensive of stoppages occur under such circumstances, there are numerous disputes all over the nation every day in the week. Recognizing this fact, the federal government long has been active in resolving disputes that seem incapable of settlement by the parties directly concerned. Since the establishment of the Department of Labor, the services of professional labor relations conciliators have been made available in case of significant labor disputes. In addition, the federal government has set up special machinery to assist in reconciling disputes on the railroads or airlines of the nation, and other federal representatives do much unofficial work in promoting the settlement of disputes.

Both major wars that the United States has fought in the twentieth century have brought a very great increase in the number and intensity of disputes. Therefore, during both wars, special agencies have been created to supplement existing dispute-settling services. These have done their wartime jobs, and in both instances have been disbanded shortly after cessation of hostilities. Both, using pressures and policies that could be forced through under the patriotic fervor of war, found their effectiveness reduced by attitudes of unions, employers, and the public immediately after the wars.

Another field of federal control is that of attempts to decrease the economic insecurities of modern life or to ease their effects once insecurities have appeared. Uncertainties as to job tenure, a reasonably comfortable and independent old age, physical risks and the occurrence of sickness of the wage earner or his family, as well as fluctuations in tax levels, price levels, and so forth, make the worker's life very insecure. Although complete security cannot be expected as a result of any government policy, and complete security may not even be desirable, any widespread improvement in the degree of security will have to come from government action or action by business induced by the government. Therefore, an adequate degree of social security demands a government program. The federal government did not move into the field of social security legislation until it became apparent that state programs were developing so slowly and with such widespread variations that they were not adequately meeting the problem. The federal program of unemployment and old age security is relatively new, being largely a product of the 1930's.

Federal attempts at regulation of child labor met with a number of rebuffs, through adverse court decisions and the refusal of the states to ratify a constitutional amendment enabling the federal congress to enact child labor regulations. State legislation regulating child labor was common, but the wide variations in the laws and their administration brought the first attempt at federal control in 1916. However, it was not until 1938 that a federal child labor law of broad coverage was enacted which was allowed to stand by the Supreme Court. Federal regulation of child labor in covered occupations is now a part of the law of the land.

The authority of the federal government has been extended in still other areas. Railway and other interstate transportation workers are the subject of considerable legislation. In addition, labor conditions required of government contractors have exerted an influence by serving as a yardstick. Also, agencies of the government propose sample legislation that may affect the type and content of state legislation. Finally, the labor policies of the government toward its employees and those in effect in the District of Columbia will have an influence on the legislation of lesser political areas.

From this summary it is clear that the federal government now has legislation on the statute books that influences the economic well-being of the majority of the people. In the field of labor problems and labor-management relations the controls are relatively new, but they are likely to continue and to be expanded.



### The areas of government controls: state and local

In addition to the increasing amount of federal legislation, there is in every state in the union a great variety of laws that affect labor relations and labor problems. While these laws are less important, relatively, than they were prior to 1930, they are still very significant because some fields of labor regulations are left entirely to the states, and, in other instances, workers who do not come under federal legislation must look to state enactments for protection.

For example, the bulk of the safety legislation of the nation is the product of state legislatures. Most workers are employed under safety conditions set or influenced by state legislation. Provisions normally pertain directly to health and safety conditions such as ventilating devices, access to fire escapes, provisions for drinking water, and cleanliness of the work place.

In a similar vein, all states have enacted workmen's compensation laws, which provide that if a workman is injured on the job he shall be paid certain weekly benefits for time lost and medical benefits as well. In addition, such laws provide set allowances for permanent disabilities, such as the loss of a member or function of the body, and a considerable number of states provide benefits for persons injured by occupational diseases as well as by accidents. Such legislation actually has resulted not only in the provision for medical and monetary benefits, but also in much more safety consciousness than would otherwise have been the case.

A number of states have enacted legislation dealing with collective bargaining rights and duties and with the settlement of disputes.<sup>26</sup> These laws have attracted more attention than their number would seem to warrant. However, since they tend to be much less sympathetic to labor than recent national legislation of the 1930's, it is possible that some of the state laws may have served as examples for more restrictive federal laws in the first session of the conservative 80th Congress.

Many states have enacted anti-injunction laws, some being passed prior to the federal legislation, but a number being put on the statute books after the federal law in order to exercise control over state courts similar to that imposed by the nation's Congress on federal courts. Thus, the net result is that, through federal court restriction and the restrictions by state legislatures, the use of court injunctions against labor during industrial disputes is widely controlled. However, the issuance of injunctions under specified conditions is not pro-

<sup>26</sup> Yoder, Dale, "State Experiments in Labor Relations Legislation." *The Annals of The American Academy of Political and Social Science*, November, 1946, Vol. 248, p. 130. Also see below, Ch. XXV. See also: Acee, Alfred, "State Labor Legislation in 1947." *Monthly Labor Review*, September, 1947, Vol. 65, No. 3, p. 277.

hibited, but careful stipulation of good injunction practice is made.

To every worker the wages and hours of his employment are important. Although the federal government succeeded in 1938 in putting on the statute books wages, hours, and child labor legislation that bore successfully the scrutiny of the Supreme Court, up until that time little successful regulation had been accomplished even by the states. The constitutionality of governmental determination of minimum wages was long in doubt, final court approval coming in 1937 in the third significant case appealed. At the present, state wages and hours legislation serves as a supplement to federal legislation in protecting some groups not covered by national controls. If state governments so desire, they can set higher standards than federal law and thereby affect workers under the jurisdiction of federal controls. However, they cannot undermine national regulations by setting lower standards.

A very wide area of state labor regulation is that of child labor. Federal controls of child labor were denied by the Supreme Court until the late 1930's. This general field of legislation includes a wide range of controls of wages and hours, safety conditions, school attendance, time of work, and other matters. State controls in this area have met with relatively little objection by the courts.

There are, of course, other labor regulations by state governments, but the preceding pages serve to indicate the general fields of state control and the expansion of federal regulations. In a like manner, the state has surpassed local government as an important source of regulation. The day of the relatively isolated community that could handle all labor problems on a local basis is past. Many, probably most, of the important issues that confront labor cannot be settled adequately by local policies or controls. However, the attitudes of the local police and ordinances on such subjects as public assembly, fair employment practices, settlement of local labor disputes, and the like, give the policies of local governments considerable importance.

#### Court attitudes and general considerations

The foregoing summary statement of the function and the nature and extent of current labor controls, to be extended and analyzed in subsequent chapters, points up the fact that our economy is affected continuously at every turn of the road by government regulations. Labor relations, wages, hours, working conditions, rights of workers, child labor, and dispute-settlement plans are either determined or affected by government action. The economy is far from one based on *laissez faire*, and, although there will be shifts from time to time in government policy, the tendency probably will be toward a greater degree of social control of industry.

Not only have long strides been made in the extension of legislative controls, but another facet of government control also has changed markedly. The courts of the nation have shown a significant change in attitudes. Since 1935 the Supreme Court of the United States has validated many pieces of legislation that unquestionably would have been ruled invalid a few years ago. Justice Brandeis attributed to the courts as long ago as 1921 "a better realization of the facts of industrial life,"<sup>27</sup> which shift may have figured in the changed court attitudes of the 1930's. However, it seems more reasonable to attribute the change in Supreme Court rulings to the change in the membership of that body.<sup>28</sup> It is doubtful if the members of the courts changed greatly in their understanding of "the facts of industrial life," but certainly court appointees of the late 1930's were more likely to be liberal in their economic attitudes than were most of their predecessors. If this be true, then the liberalization of the courts came from new members on the bench more than from new thinking by the veteran judges.

Whatever the reason for the change in judicial attitudes, the shift made possible much of the governmental regulation in labor relations that has just been summarized. For it is the courts of the land, and in the final analysis, the United States Supreme Court, who determine what controls may and may not be administered. Prior to 1935, the interpretations and rulings of the Court were instrumental in holding back many socially desirable pieces of legislation. Undoubtedly, as will be shown from time to time in the following chapters, the courts had solid technical grounds and precedent cases on which to base their decisions. There is no question, however, that in many instances a different ruling could have been handed down and bolstered by precedents.

It is clear that there is no longer a question of whether or not there will be legal controls in our economy. Governmental guidance or control is certain to continue. Despite this fact, certain questions do arise as to the extent and nature of the controls. One important problem is that of whether there should be an expansion or easing of controls; there is not the same need for guidance at all times and some flexibility is necessary. This need for flexibility is due largely to the fact that the extent of regulation is dictated largely by economic conditions. Economic collapse in depression periods, or the emergency of war, for example, bring a demand from many that

<sup>27</sup> *Duplex v. Deering*, 254 U. S. 443 (1921).

<sup>28</sup> Despite the importance of change in membership, it is true that there was a noticeable shift in rulings of the majority of the court in 1937. This seems to have been due to a shift in the position of one justice. Subsequent appointments extended this change in attitude.

governmental direction be imposed. With these demands, or lessened objection, legislative changes are likely to come about, since the great majority of all legislation is a result of the pressures of special interest groups.

If economic controls are inevitable, what should be the nature of the controls, from what source should they arise, and what effect will they have on the nature of our economic and political life? The controls that can be exercised may come either through judicial interpretation and application of the common law—the legal customs and traditions of our society—or, to some extent, from improvisation by administrators using existing legislation that does not adequately fit the situation in question. To some extent these stop-gap measures must always be used, since it is not possible to have legislation that meets all problems that arise.

Even though the contents of the statute books are placed there in many cases as the result of pressures exerted on legislators, legislation seems to be the most desirable form of control. Guidance coming from the common law and from administrative ruling is a product of the thinking and the prejudices or opinions of one or a few persons. Such control is less democratic and less representative of the public than is that springing from the elected representatives of the people, despite the weaknesses that exist in our election process. There is an especial danger involved in relying too heavily on the common law. It is based on precedent, and the persons applying it are looking backward for means of dealing with current problems. Experience is not valueless, but the nation cannot progress by looking backward for cues as to how to conduct itself in dealing with current economic problems. At least some of the persons who have a part in shaping our legislative guides must have an eye to the problems of the day and of the future.

The conclusion should not be drawn that the courts do not have a function to perform. That function, and a very important one, is to interpret statutory enactments and determine whether the legislation is consonant with the Constitution of the United States. But the application of common law where no legislation exists amounts to lawmaking by the courts, a function which they should not perform, and one which, if performed, is not so representative as when done by the legislative bodies. Consequently, to maintain as great a degree of democracy as possible, the greatest portion of necessary controls should come from legislatures and the federal Congress.

What will be the effect of economic controls on our economic and political life? Must democracy and capitalism disappear with the increase in the area of control? The danger of losing the essence of our way of life increases with the extension of controls. But it is

also true that without controls, and probably an increasing amount of controls, the danger is as great or greater. On the one hand, controls may take away the right to vote, or to worship according to one's own convictions, or to go into business, or to join a free labor union. The world has seen such controls in Fascist nations. On the other hand, so little guidance and control that the economically and politically powerful are allowed almost complete license may result in the less powerful losing many liberties. Neither extreme is in keeping with the avowed political and economic belief held in the United States.

The basic problem of economic controls—in so far as this study is concerned, labor controls—is in ensuring that the controls are as democratic as possible. We must keep and improve our democratic elections, broadening the suffrage to groups now unable to exercise their right to vote. We must do more to teach the public, by every available means, the political and economic issues at stake and the alternative methods of handling them. Then the representatives of the people must provide the rules of government needed to promote the interests of the public. And finally the controls must be dynamic. Conditions do not remain static; legislation must not remain so either. A piece of legislation that is perfectly logical and necessary at the time of its enactment may be greatly out of step with the needs of the public ten or fifteen years later.

### Questions

1. Is it reasonable to assume that workers in and owners of a business have economic goals that are basically in conflict? Why?
2. What is meant by a government policy of *laissez faire*? Is the term a relative or an absolute one?
3. Is the extension of government controls in labor-management relations compatible with a democratic form of government?
4. Are there conflicts and insecurities in labor-management relations that cannot be solved by the actions of the two parties directly involved? Why?
5. Are there conflicts and insecurities that cannot be solved by government action? If so, what are some of these? Why?
6. Why do war periods increase the number of conflicts in labor-management relations?

## CHAPTER II

### MEANS OF EFFECTUATING LABOR CONTROLS

There are numerous means of exercising government economic controls, ranging from legislative enactments through court rulings to various pressures of executives and administrators. When government economic controls are mentioned, most persons probably think of statute law. Certainly the enactments of legislative bodies are important, the relative significance of federal controls having grown, especially since 1930. However, the rulings of the courts and the actions of executives and administrators supplement legislation or in some cases are used in its stead. In recent years, and especially during the emergency of World War II, much control has been exercised through the use of executive orders or other executive or administrative activities and pressures. A general survey of the nature and extent of each of these types of control follows.

#### Nature and extent of statutory controls: federal

In the area of statutory controls, the laws of the federal Congress have spread into a great number of fields since 1930. Although prior to 1930 there were on the federal statute books laws that affected the workers of the nation, the period of bold extension of legislation controlling labor relations came after that time. Now the federal government reaches into the states and localities to specify many of the conditions under which persons may be employed. The Congress is not free to enact any legislation that it may choose, however, since some reasonable relationship must be shown between the controls enacted and either the flow of interstate and foreign commerce or the power to levy taxes and spend for the general welfare. But these powers have proven quite elastic; a brief survey of federal labor laws will show this fact.

At the close of 1947 federal enactment required that workers not exempted from the legislation and working in establishments that are engaged in commerce or producing goods for interstate trade must be paid a minimum of 40 cents per hour and must be paid not less than time-and-one-half for all hours over 40 per week. In addition, in the same piece of legislation, producers were forbidden to ship in commerce any goods produced within the nation on which

"oppressive child labor" has been employed within 30 days prior to the shipment.<sup>1</sup>

In another broad field the federal Congress has reached into the states and localities to set up standards of behavior for employers, an interruption of whose business would affect adversely interstate or foreign commerce. Such employers are forbidden to interfere with their workers' free determination of whether they wish to join a union, and to interfere with the functions of the union or to refuse to bargain with *bona fide* union representatives. In addition, a number of unfair labor practices are forbidden to unions. Here, again, the action was taken under the power to regulate commerce, since labor disputes over the right to organize in unions would affect adversely commerce between the states or with foreign nations.<sup>2</sup>

The federal Congress has used another method of exerting its influence on local labor and social problems. In the Social Security Act of 1935<sup>3</sup> the power to levy and collect taxes was used in such a way as to encourage and almost to require that the states enact certain desired laws. As will be noted later, over 90 per cent of the taxes collected from employers for the provision of unemployment compensation were returned to the states if the state enacted an adequate unemployment compensation law. In order to ensure the return to the states of as much of the federally collected taxes as possible, in less than two years every state in the union enacted legislation providing unemployment compensation.

Another method of influencing state social legislation was contained in the same federal law. Provision was made to pay roughly half of the grants paid by states to dependent persons such as the blind or the aged. Again the desire to bring to the various states federal tax funds, which would be spent largely with local businessmen, brought wide and prompt enactment of the legislation desired by the federal government.

The types of federal legislation outlined in the preceding paragraphs indicate the manner in which Congress has extended its influence into areas commonly thought of as being subject to state control. In addition to the above recently occupied areas of regulation, the Congress can act to meet the problems of workers engaged in interstate and foreign commerce. Also it has the power to limit the jurisdiction of the federal courts and to specify the labor condi-

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<sup>1</sup> See below, Ch. XIV for a detailed discussion of the Fair Labor Standards Act of 1938, the administrative provisions therein, and the exemptions and limitations that are contained in the law.

<sup>2</sup> See below, Ch. XVI for a detailed discussion of the National Labor Relations Act and experiences under the act. See also the discussion of the Taft-Hartley Law, Ch. XXV.

<sup>3</sup> See below, Chs. XVIII and XIX.

tions required of government contractors. Each of these methods of exercising control and others have been used in one or more instances to bring about federal and state economic and social control.

It is important that those who are interested in labor legislation recognize the extent of federal labor controls. The laws are significant for their direct effect; some 27 or 28 million workers were covered by unemployment insurance early in 1947. The number that would have been covered without the passage of federal legislation cannot be known, but only Wisconsin had provided such protection prior to the federal law. In old age protection, only 28 states provided any old age pensions prior to the passage of the Social Security Act. In 1946 all states had such laws and, in addition, over 55,000,000 persons had been assigned social security numbers, although the number of persons actively building up old age and survivors' insurance rights was smaller, probably under 50,000,000. In the field of collective bargaining, the size of the union movement almost tripled in the first ten years of the National Labor Relations Act, although other factors than the act contributed to the growth.

In labor-management relations federal legislation has influenced state policies. By 1946 ten states had enacted Labor Relations Acts purporting to extend to workers, in those states, not covered by the federal law the same rights as the Wagner Act guaranteed.<sup>4</sup> A number of states followed the pattern set by the Norris-LaGuardia Act of 1932 and prescribed similar restrictions on their state courts concerning the issuance of labor injunctions.

#### Nature and extent of statutory controls: state and local

Prior to 1930, the great bulk of labor legislation that was permitted by the courts was enacted by the states. Before the start of the twentieth century, the federal government began to legislate on problems of railroad workers, and, by the first World War, for children, but one adverse court decision after another invalidated many of its efforts. Therefore, the bulk of protective labor legislation enacted up to 1930 was the work of state legislatures. It was common for the courts to concede that under our form of government the states had power to legislate for the general welfare, since the police power held a more clear relationship to general welfare than did the power to tax or regulate interstate commerce. However, state laws frequently were held to violate constitutionally guaranteed rights, especially those of liberty or freedom of contract.

Although the Supreme Court has begun to approve the right of the federal government to enact controls for the solution of some

<sup>4</sup> As will be shown later (Ch. XXIV), a number of the state acts differed widely from the national law in provisions restricting the right to strike and the like.



labor problems, much of the legislation at the present time is and will continue to be enacted by state legislatures. Some fields, like unemployment compensation, accident compensation, and safety legislation, are largely left to the states. Thus, at present, every state in the union provides that those workers in covered occupations who are out of work through no fault of their own will receive unemployment compensation—generally about 50 per cent of their average wage and extending, after about a one-week “waiting period,” for as long as 20 weeks in some instances. Similarly, all the states provide some compensation for workers injured on the job, with marked variations in the size of benefits, their duration, and the conditions of payment.

With wide variations in content and liberality, states have enacted legislation concerning safety conditions in places of employment, the employment of children, and minimum wages for certain groups of workers; some have made provision for the settlement of labor disputes, for guaranteeing rights to union membership, forbidding discriminatory hiring practices, and so forth.

With the development of large-scale business enterprises, multi-plant companies, nation-wide or larger markets, and much national and state legislation that affects the labor problems of the locality, the actions of local governments have declined. However, even today local governments exert considerable influence by their treatment of municipal workers, the wages paid, their attitude toward organization, and the consultation or use of labor leaders in public programs. Also, the manner in which law enforcement is carried out can do much to make or break a strike. Ordinances prohibiting mass assemblies or blocking streets or walks may be used when strikes and picketing occur. Fair employment practice ordinances and enactments establishing local dispute-settling committees are found in a few localities and may increase in number. Thus, the attitude of local officials and the policies they follow cannot be disregarded. Many a labor dispute that has state- or nation-wide repercussions may be influenced by local government action.

#### Administration of statutory controls

The effectiveness of legislation, either federal or state, depends largely upon its administration. Much legislation is so drawn that its intent is not always clear and the application in some specific instances is not definite. In such cases, the quality of the administration is of paramount importance. Administration, like judicial interpretation, is influenced by the social and economic opinions of the officials who apply the laws. For example, those responsible for ad-

ministering the unemployment compensation law of a state are in some instances primarily interested in maintaining a large, liquid compensation fund. This policy, while it may give an impressive balance of funds, will mean less protection for those who are unemployed than when the laws are administered by persons who are interested in providing social protection.

It will become clear, as the provisions of various laws are examined, that in many instances there is sufficient latitude for either of two or more policies to be followed. Such administrative latitude is almost inescapable; it is impossible to draw any piece of legislation so that its application is perfectly clear in every case that may arise. Thus it is possible for good legislation in effect to be nullified by poor administration or for poor legislation to be made relatively effective by competent administrators who do not bind themselves closely to the letter of the law. Careful and explicit wording of legislation is important, but it cannot be so drawn as to ensure accomplishment of its intended purpose. In the final analysis, the effectiveness of any regulation is determined in large part by the quality and character of its administration.

There is another factor to be noted when surveying legislative controls; this is the general tendency of the enactment of controls to lag far behind the need, and of controls, once they are in effect, to be inflexible and tardily modified. Generally, economic and social conditions are likely to become badly maladjusted before the situation is forced on the attention of the legislators strongly enough to bring action. Then, once a statute is enacted, amendments and modifications are not likely to keep pace with the times. A minimum wage of 40 cents per hour had been needed for many years and meant quite an improvement at the time the federal Congress enacted the Fair Labor Standards Act in 1938. By the fall of 1947, many previously low wages had moved far past the minimum and 40 cents per hour was clearly a sub-standard wage. Again, the National Labor Relations Act of 1935 was clearly needed to guarantee the worker's right to join a union if he so desired, a right which had been denied by various means on countless occasions; the union movement of 3½ or 4 million workers was relatively weak and completely unestablished in some industries. At the same time, anti-union sentiment was an obsession with many employers and much of the public. Ten years later, with union membership perhaps four times as large, and with less belligerent opposition to unionism on the part of many employers, certain revisions were in great demand. In view of the increased number of industries with widespread union membership and of the failure of the union movement to develop

good leaders as rapidly as they drew in new members, a very good case was made for revisions of the law to spell out the obligations and responsibilities of unions as well as of employers.<sup>5</sup>

It can be argued that modifications of control will come when pressure for revision or extension becomes strong enough. This probably is true, but the most vocal and effective pressure groups may not represent the best interests of the public; however, in a democratic society this seems an inescapable weakness. The ideal situation would call for recurrent scrutiny of legislation, with modifications as weaknesses in the regulations developed or as social or economic conditions made revisions desirable. At present, however, and probably in the future, the socially desirable must bow at times to that which is politically expedient. This situation does not mean that controls are undesirable but rather that weaknesses exist—weaknesses which it should be possible to lessen in the course of time.

There is another marked deficiency of legislative controls that needs remedying. Many laws exempt from coverage groups that need the protection afforded by the law. The federal government cannot touch certain groups to which controls are inapplicable through the power to regulate interstate commerce; in addition, agricultural workers, persons working for non-profit organizations, and very small establishments are usually not covered due to political expediency or administrative problems. Similarly, state laws are likely to exempt agricultural workers, domestic employees, and other groups. As a result, in most states farm workers and domestic employees are not protected by accident compensation laws, draw no unemployment compensation when they are out of work, and are not covered by the old age and survivors' insurance provisions of the Social Security Act. Furthermore, the minimum-wage provisions of the federal Fair Labor Standards Act do not apply. In many instances, the exemption of certain groups was expedient at the time the law was passed. Sufficient votes to enact many laws are often garnered by making concessions or compromises on the coverage or content of the bill. With the agricultural areas strongly represented in the national Congress, many labor laws do not apply to farm workers.

There is another difficulty that explains some of the exemptions found in labor laws. The administrative problems of enforcing a law for employers hiring one or a very few workers, or part-time workers, are great. A large part of all farm or domestic employees are hired by such small enterprisers. Conceding the difficulty of

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<sup>5</sup> This statement is not meant to imply that the conduct of organized labor was sufficiently abusive to warrant some of the provisions of the Labor Management Relations Act of 1947.

applying economic controls to small individual employers, the failure to attempt the control still is not defensible. The failure means that in many instances groups who most need protection are denied it.

### Judicial controls

Another method of exercising government control is through the rulings of the courts. One of the functions of the courts in the field of government labor controls is to pass on the validity and applicability of statutes and to decide whether or not any constitutionally guaranteed rights are violated. No important piece of legislation of questionable constitutionality escapes the scrutiny of the courts. And even after the validity of a statute has been determined, there are likely to be frequent questions of application in one instance or another until various issues have been ruled upon and a series of precedents established.

Important issues of constitutionality or applicability will be carried to the Supreme Court of the United States in almost all cases, in order to get the final judicial ruling on the question at issue. Such appeals are time consuming. Generally, a case beginning in the federal district courts and appealed to the Circuit Court of Appeals and finally to the Supreme Court will consume from two years upward in hearings and appeals.<sup>6</sup> Relatively speedy cases require a couple of years from their beginning until final action, and there are instances in which cases have dragged on for ten years.<sup>7</sup> Like the mills of the gods, the wheels of justice grind slowly.

One fact will develop clearly in future chapters of this study. When the courts render an opinion on the validity or applicability of any statute, the social and economic attitudes of the participating judges strongly influence the decision. When the judgments involve estimates of social and economic values and desirable goals, there are likely to be especially wide variations in interpreting the ambiguities of the legislation under consideration. The importance of the philosophy of the judiciary cannot be overemphasized, for legally impressive language and precedents can be found to bolster diametrically opposed decisions. This fact is borne out by the large number of opinions to which there is one dissent or more, or, on some occasions, separate concurring opinions. In each such

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<sup>6</sup> Cases arising in state courts as a result of dispute over state legislation or actions may, after going through the hierarchy of state courts, be carried to the federal Supreme Court if there is a question of the violation of rights guaranteed by the Constitution or of action not permitted to the states.

<sup>7</sup> In the *Coronado Coal Co.* cases, 259 U. S. 344 (1922) and 268 U. S. 295 (1925), the dispute was in the courts for 11 years, during which it went through the hierarchy of federal courts twice. In the *Duplex Printing Co.* case, 254 U. S. 443 (1921), the issue was in the courts eight years.

opinion the author gives the reasoning and precedent cases on which he bases his opinion. Each justice considering the same set of facts and issues gives his personal opinion on the legal, economic, moral, or other issues involved; but the philosophy of justices like Holmes, Brandeis, and Cardozo led them in many instances to opinions diametrically opposed to those of justices like Butler or Sutherland or McReynolds.

It should be noted that the development of the great number of dissents or separate concurring opinions is relatively recent.<sup>8</sup> This fact seems to be particularly disconcerting to the legal profession, for it destroys much of the certainty of the law. Much of the uncertainty probably arises from the fact that as legislation moves into the field of social and economic controls many cases raise issues of social or economic philosophy rather than legal precedent; judges, like other persons, have widely divergent views thereon. To the non-legal public it is desirable to have a socio-economic basis for judicial opinions rather than a purely legalistic one, whatever it may do to the certainty of the law.

Whatever the bases upon which rulings of the Supreme Court are reached, they have an important bearing on future opinions of the lower courts, both federal and state. The opinions will influence the attitudes of the justices in some instances, and once the ruling becomes a part of the record it serves as a precedent for bolstering future decisions; however, this does not mean that the Supreme Court will not reverse itself from time to time. Therefore, as a final determinant of the meaning and constitutionality of any law or of the reasonableness of the administration or application of a law, the rulings of the courts are of paramount importance. Due to the leeway for varying decisions on the part of the justices, the well-being of the nation is strongly influenced by the philosophy of the majority of the federal Supreme Court. For this reason, the nomination of justices to the Supreme Bench is an extremely important function of the President.

It has already been pointed out that there are numerous instances in which there is no legislation that fits a particular situation. In such cases the courts or administrators and executives must act as they see fit until the legislature moves to enact the necessary regulations. In other words, the courts or administrators act in a quasi-legislative capacity. The issuance by the courts of injunctive relief is an example of quasi-legislative action by the judiciary. Injunctions are orders issued by a court of equity directing that certain things be done or not done. Such orders are supposedly

<sup>8</sup> Corwin, E. S., *The Constitution and What It Means Today*, preface, pp. ix-x. Princeton: Princeton University Press, 1946.

issued only to forestall irreparable damage to property. The history of labor injunctions and the undesirable conditions under which some of them have been issued need not be discussed at this point;<sup>9</sup> however, until the 1930's, there was widespread use of the injunction as a means of exercising government control in labor disputes, the weight of the court being thrown on the side of the employer in the majority of cases. One authority estimated that from the time of the first labor injunctions in the United States to May, 1931, there were nearly 1850 injunctions issued on behalf of employers, whereas workers had been granted fewer than fifty.<sup>10</sup> Therefore, the injunctive relief granted by judges was understandably a government tool strongly opposed by unions.

It will be noted subsequently that, owing to the passage of the Norris-LaGuardia Act, the labor injunction does not present so much of a problem as previously. However, the act does not forbid the issuance of injunctions in all cases, even by federal courts. State courts are not affected by the law, although some states have applied restrictions to their courts similar to those of the Norris Act on federal courts. Injunctions are not entirely a problem of the past, especially since the Labor Management Relations Act of 1947 was enacted, although their usage is sharply limited.

On a basis similar to the use of injunctions for economic controls, the courts have improvised in still another manner. The common law—the prevailing legal customs and mores of society—has furnished the basis of many court rulings. Since the common law is not written and is based largely on an interpretation of what is customary, this type of control varies widely from time to time and from one jurisdiction to another. As will be shown later, the early common law of the United States sprang largely from the precedent and custom of England. Since this common law, once it became a part of the judicial record of this country, became a basis of precedent for later decisions by our courts, early English law has left an indelible mark on the American judiciary. Thus, the American public often has been in the strange position of having nineteenth and twentieth century legal and economic questions settled on the basis of precedent that indirectly goes back to English law a century old or more.

#### Executive action: federal

Another means of government control is being used more and more. This control is most widely used during emergency periods,

<sup>9</sup> See below, Ch. VI.

<sup>10</sup> Witte, E. E., *The Government in Labor Disputes*, pp. 84 and 234. New York: McGraw-Hill Book Co., Inc., 1932.

but it seems clear that much of the action born of emergency will carry over to become a normal part of our system of economic regulation. Executive action at federal, state, or local levels may take a number of forms, such as the issuance of executive orders by the President, conferences, appointment of special commissions, and ordering out troops in especially difficult situations. State and local officials may do much the same thing for problems within their jurisdiction. An emergency such as war will bring the greatest use of executive action, but much of it may occur at other times, and the concept of what is an emergency varies as widely as does the opinion as to when legislative provisions are not adequate to meet a situation. Thus, state militia have been sent into situations when there was no agreement as to the need for such action. Again, federal troops were sent to the Chicago area in the Pullman Strike of 1894 although the governor of Illinois objected strenuously that they were not necessary. Federal, state, or local officials have intervened in many disputes before it was proven that there was no chance of labor and management reaching an adequate settlement. There is, perhaps, no adequate safeguard against abuse of executive power other than the very slow process of replacing officials at future elections or lobbying-through legislation to meet certain problems. Neither of these remedies is speedy or certain of accomplishment.<sup>11</sup>

At the federal level, executive action of a quasi-legislative character frequently comes about through executive orders. Although executive orders and proclamations have been used by the President since the creation of the office and the present numbering system of executive orders dates back to the Civil War, their use to implement economic controls is a relatively new development.<sup>12</sup> During the twentieth century the presidential executive order has become a government tool of increasing importance. It was broadened much in scope as executive power was increased during the first World War. Agencies of much economic importance,

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<sup>11</sup> Court decisions disallowing certain executive abuses may, by the precedent they set, have the effect of limiting and guiding executive controls.

<sup>12</sup> Although not listed as an executive order by the Historical Records Survey of the Works Progress Administration, Lincoln's Emancipation Proclamation was an extremely broad and sweeping economic measure issued by presidential fiat. On January 1, 1863, Lincoln issued his proclamation "by virtue of the power in me vested as Commander in Chief of the Army and Navy of the United States, and as a fit and necessary war measure. . . ." By the order, slaves in states or parts of states in rebellion were freed. Thus, by presidential order, much property was taken from Southerners. At a later date, this proclamation was backed by the thirteenth amendment. Despite this proclamation, which might have served as a precedent, presidential executive orders were not used extensively or for primarily economic reasons for many years to come.

such as the War Trade Board and the Food Administration,<sup>13</sup> were established by executive order of the President.

During the "New Deal" of the late President Roosevelt executive orders were given wider and more vital economic use. For example, the codes of fair competition provided for in the National Industrial Recovery Act were put into effect by executive orders, after having been prepared by industry representatives (frequently including labor representatives), and submitted for approval to the appropriate offices of the Recovery Administration.<sup>14</sup> But the most extensive use of executive orders for economic guidance and control came with World War II. Before examining the extent of the wartime controls, it is desirable to note the basis for legislative action by the executive.

As is the case with many other sections of the Constitution, there is no clear distinction as to what legislative power the Chief Executive is granted by that document. Since the executive power "is vested in a President of the United States of America,"<sup>15</sup> the problem arises as to how much the President can use his own initiative in carrying out his executive duties. Congress enacts certain legislation that is to be executed by the President and persons responsible to him. Clearly, the more aggressive the President is, the more he will assume power to lay down policies and make provision for the execution of the laws of the land. A strong man in the presidential office will in many instances lay down policies and principles as guides where there is no congressional action that adequately meets some situation. In both the execution of legislation and the establishment of policies and principles, the actions of the President may verge on the legislative. The laws that come from Congress are usually so drawn as to necessitate orders and rules and regulations to make the law definite. As Professor Corwin states it, this situation gives rise to "executive lawmaking."<sup>16</sup>

Perhaps the basis of the expansion of the power of the President has been the gradual but certain decline of the *laissez faire* philosophy. In its place there has grown, with wide variations from nation to nation and from time to time in one nation, a philosophy that the national government should be a force for economic guidance or reform.<sup>17</sup> In the United States this philosophy and practice

<sup>13</sup> Executive Order 2729-A, dated October 12, 1917; Executive Order 2679-A, dated August 10, 1918.

<sup>14</sup> *Presidential Executive Orders*, Compiled by W.P.A. Historical Records Survey. New York: P. V. Books Inc., 1944.

<sup>15</sup> Constitution of the United States, Article II.

<sup>16</sup> Corwin, E. S., *The President: Office and Powers*, p. 115. New York: New York University Press, 1940.

<sup>17</sup> *Ibid.*, p. 314.



was given strong support in word and action by President F. D. Roosevelt. During his administration, when legislative or judicial attitudes or actions lagged behind the needs seen by the executive, there was no hesitancy in using whatever measures were deemed expedient to reach the desired goal. Thus, because of the extreme emergencies created by World War II and its economic prelude and because of the unusual drive and purposefulness of the President, executive action and orders at the federal level were especially numerous in the early 1940's. As will be noted, however, many of the decontrols of the postwar period also were effected by executive orders.

A brief survey of a few of the important orders issued to effect economic controls will show how widely this method of control was used. One of the most controversial boards of the great number set up during the war was the War Labor Board,<sup>18</sup> which replaced the National Defense Mediation Board. Although the Board was originally created to settle labor disputes for which existent government procedures for adjustment were inadequate or ineffective, it eventually became involved in passing on the majority of all wage increases. But the important point for this discussion is that the Board was created, given certain functions to perform, and directed to follow certain policies, all by executive order. And by presidential order a traditional government policy was changed; the Board found itself in the strange position of being the first government agency with the job of holding the wage rates of private employees down. Previously government attempts had been to put a floor under wage rates and keep them up.

The liberty of an employer to hire as many men as he sees fit and to recruit them from any available and desirable source has been considered an important economic right. However, the War Manpower Commission<sup>19</sup> limited this right before the war was over. The problem of allocating manpower between the civilian and military establishments of the nation, of determining which employers could hire workers, and of specifying what classes of workers were essential to the war effort and which were not was a part of the function of this agency. These functions were in addition to supervising a nation-wide system of employment exchanges. This commission, directing and controlling economic activities previously considered inviolable, was created and destroyed by the President by means of executive orders.

While deplored by many, prior to the war there was no question of

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<sup>18</sup> Executive Order 9017, dated January 12, 1942.

<sup>19</sup> Executive Order 9139, dated April 8, 1942.

the right of employers to establish rules concerning the race, religious beliefs, and so forth of the persons they hired. Clearly, such policies were not in keeping with some of the thoughts expressed in the Declaration of Independence and the Constitution of the United States. However, when the Fair Employment Practices Committee was created by executive order,<sup>20</sup> there were many instances of strong opposition to the enforcement of a non-discriminatory policy. Here, again, was an attempt at significant economic and social regulation coming, not through action of the legislature, but through quasi-legislative action by the Chief Executive.

Another basic economic liberty prior to World War II was the right of an individual or group to bargain for higher wages. The threat of inflation was a very real and serious one during the war, and holding wage rates down was one phase of the federal government's attack on this problem. Another method of attack was the general establishment of maximum or "ceiling" prices. These sweeping economic controls came by executive order. One order<sup>21</sup> listed the few conditions under which wage rate increases were to be allowed. Another<sup>22</sup> directed the price administrator and the food administrator "to take immediate steps to place ceiling prices on all commodities affecting the cost of living."<sup>23</sup>

The orders listed above are only a few of the many that were issued during the war period to state economic policies and programs and to create the machinery of control. The significant fact is that some of the most far-reaching and controversial economic controls ever imposed in the history of the nation came through the "law-making" of the Chief Executive. These orders were issued on the basis of the constitutional powers of the President and the authority vested in him by the emergency War Powers Acts. For example, the order establishing the War Labor Board<sup>24</sup> was issued "by virtue of the authority vested in me by the Constitution and the statutes of the United States." The order providing regulations relating to overtime wage compensation<sup>25</sup> was issued "by virtue of the authority vested in me by the Constitution and the statutes, as President of the

<sup>20</sup> Executive Order 8802, dated June 25, 1941. Reorganized and its powers augmented by another executive order, number 9346, dated May 27, 1943.

<sup>21</sup> Executive Order 9250, dated October 3, 1942.

<sup>22</sup> Executive Order 9328, dated April 8, 1943.

<sup>23</sup> The President previously had been given specific authority to act along these lines. The Emergency Price Control Act of 1942, approved January 30, 1942, permitted the establishment of maximum prices, and the Stabilization Act of October 2, 1942, amending the Emergency Price Control Act of 1942, directed the stabilization of wages. However, the executive orders noted above spelled out and put into effect these sweeping controls.

<sup>24</sup> Executive Order 9017, dated January 12, 1942.

<sup>25</sup> Executive Order 9240, dated September 9, 1942.

United States and as Commander in Chief of the Army and Navy." The order discontinuing certain wartime agencies<sup>26</sup> and transferring some of their functions to the Department of Labor was based on "the authority vested in me by the Constitution and the statutes, including Title I of the First War Powers Act, 1941, and as President of the United States."

As was previously stated, there is no definite statement of the exact powers and functions that were lodged in the President's office when the executive power was placed therein. Perhaps there neither can nor should be such a statement, because the need for presidential lawmaking will not be the same at all times. In emergency periods or at other times when legislation does not meet the need for government guidance or control there is a real need for executive action. However, executive lawmaking should not be a standard practice that continues in less difficult periods or when legislation is on the statute books that is adequate to cope with the problems at hand. Executive orders should continue to be a tool which the President can use, but Congress has been given and should exercise the legislative function.

There are other types of executive action. These may take the form of specially appointed committees or conference groups, of direct mediation by the President, or of pressure brought to bear through such methods as threats of adverse publicity, urging the finding of solutions to particular problems. As an example of the first type of action noted above, Presidents Wilson and Truman called conferences of labor and management shortly after the conclusion of the two World Wars in the hope that a plan for postwar industrial peace could be worked out.<sup>27</sup> While it is impossible to know how much better or worse events might have been under other circumstances, the labor trouble of the postwar periods demonstrated clearly the fact that adequate solutions were not found. In other instances the President may use a similar approach. When the continuation of railroad transportation is threatened by a diffi-

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<sup>26</sup> Executive Order 9617, dated September 19, 1945.

<sup>27</sup> President Wilson's first conference of labor, management, and public representatives was called on October 6, 1919 and broke up without agreement over the question of labor's right to collective bargaining. A second conference of representatives of the public only reached agreement among themselves on the question of collective bargaining, but their recommendations had little effect. Millis, H. A. and Montgomery, R. E., *Organized Labor*, p. 146 (Vol. III of the three-volume series entitled *Economics of Labor*, hereinafter cited as Millis and Montgomery, Vol. III). New York: McGraw-Hill Book Co., Inc., 1945. President Truman's conference was called in November, 1945. It continued throughout the month. Results were unimpressive. A six-volume report was issued by the Government Printing Office in 1946 entitled, *President's National Labor-Management Conference*, Vol. I, "Executive Committee," Vols. II through VI, "General."

cult labor dispute, the President has appointed special fact-finding boards to investigate the issues and propose and publicize a suggested settlement.<sup>28</sup> Despite many criticisms of the handling of railway labor disputes, these special fact-finding panels, or the publicity given the dispute, have in most instances brought about a settlement of the issues.

In addition to the naming of special boards in railway and other disputes, the President frequently intervenes personally in especially difficult situations. Such intervention may take a wide variety of forms and may range from the usually pro-labor actions of F. D. Roosevelt<sup>29</sup> to the actions of President Truman in the railway strike of 1946, which caused much objection and gained him the enmity, at least temporarily, of many union men.<sup>30</sup>

Along with the personal intervention listed above, the President was given authority in 1943 by the War Labor Disputes Act<sup>31</sup> to take possession of and operate plants, mines, or facilities in which labor disturbances threatened to impede the war effort. This power was to extend for six months beyond "the termination of hostilities . . . as proclaimed by the President" or until the prior passage of a concurrent resolution of both houses of Congress ending such provisions. Under the powers granted by this act, businesses ranging from coal mines and railroads to mail order houses were seized. However, the power was not exercised frequently and less than 50 seizures were accomplished from the passage of the act until the power expired in mid-year 1947.

#### Executive action: state and local

Within the states the governors frequently intervene in disputes, although the action is usually taken without specific authority. In 1943, only Alabama, Alaska, Nevada, and Vermont gave their governors specific authority to attempt the settlement of disputes.<sup>32</sup> However, strong officials with pronounced sympathies will step into many cases. In most instances, the governor, like any other

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<sup>28</sup> For a discussion of the most important of such railway labor disputes from 1941 to 1945 see: Northrup, H. R., "The Railway Labor Act and Railway Labor Disputes in Wartime." *The American Economic Review*, June, 1946, Vol. XXXVI, No. 3, p. 324.

<sup>29</sup> For a summary of President Roosevelt's personal activities in labor disputes see: Metz, H. W., *Labor Policy of the Federal Government*, p. 249 ff. Washington, D. C.: The Brookings Institution, 1945.

<sup>30</sup> For a summary of the rail strike see: Northrup, H. R., *op. cit.*, p. 342. For "the story of what happened from the workers' side" see: P. M., *Special Rail Strike Edition*, June 21, 1946.

<sup>31</sup> Public Law 89; 78th Congress.

<sup>32</sup> Kaltenborn, H. S., *Governmental Adjustment of Labor Disputes*, p. 117. Chicago: The Foundation Press, Inc., 1943.

elected official, is not likely to be an expert in labor-management relations and is likely to have an eye on the political expediency of various actions.

For labor disturbances on a smaller scale, local government officials frequently bring the weight of their offices to bear in an attempt to force settlement. A study issued in 1940, based on a 25 per cent return of a questionnaire, indicated that nearly half of the reporting cities of over 30,000 population expected some of the administrative officials of the local government to attempt settlement of local disputes.<sup>33</sup> Since the mayor is an elected official, he is usually not willing to take a position that will injure his political future; as a result of this fact, and with the mayor usually also lacking in a strong foundation in labor relations and without coercive powers, much of such mediatory action is fruitless. Frequently, local citizens' committees are named, where other efforts have failed, to attempt to mediate a difficult dispute. Lawyers and ministers seem to be the favorite type of members for such boards; whatever may be gained in impartiality from such selections is likely to be canceled in good part by lack of experience in labor relations.<sup>34</sup>

For both local and state officials, the manner in which the police are used in labor disputes is an additional means of exerting control. Although there are situations in which public interest demands that protection be given by the police or militia, intervention inevitably will affect the final solution by bolstering the position of one party or the other, and should be used only as a last resort. Collective bargaining should be allowed to function until it is clear that government action is necessary to protect the interests of the public and assist in bringing about a solution.

### Preliminary evaluation of means of control

The position that has been taken with regard to government labor controls is that considerable guidance is necessary. However, not all government labor controls are defensible and, in addition, there is much difference in the reasonableness of imposing controls by legislation, court action, and executive action. Quasi-legislative control by the courts or the executive should be kept at a minimum.

<sup>33</sup> Nunn, W. L., "Local Progress in Labor Peace." *National Municipal Review*, December, 1940, Vol. XXIX, No. 12, pp. 784-791.

<sup>34</sup> In 1946 a few cities were experimenting with or exploring the feasibility of regularly appointed labor-management-citizens committees to function as mediators in local disputes. The Toledo plan is the best known of these experiments. For the background of the Toledo plan see: Kaltenborn, H. S., *op. cit.*, p. 208 ff. For the functioning of the plan in 1946 see: *New York Times Magazine*, November 24, 1946, p. 16. Additional information may be found in *The "Toledo Plan,"* issued by the Institute of Industrial Relations, Wayne University, Detroit, 1947. See also below, Ch. XXIV.

The driving force that should underlie attempts at guidance by the government is a desire to protect the interest and well-being of the public. The interests of the public often have not been served by labor controls that have been used. While labor and management are both a part of the public, the interests of neither are entirely parallel with those of the public. Attempts to identify one group's interests with those of the public should be examined carefully.

This is not to say that legislation favoring selected groups in society, that is, class legislation, may not be socially desirable. Laws protecting women and children against harmful employment are not only of benefit to those workers but to society as well. Laws guaranteeing the right of workers to join unions if they so desire also are socially defensible, as are many others, such as health and safety laws or unemployment insurance legislation. On the other hand, a law requiring a certain length of strike notice, supposedly in the interest of employers and the public, may not prove to be beneficial. Some labor relations experts are of the opinion that the "cooling-off" period may prove to be a heating-up period actually defeating its own purpose.<sup>35</sup>

Undoubtedly almost every regulation will benefit some groups and many persons may generalize from their own experience and impute, in all sincerity, as a public benefit many laws that are not socially desirable. Since there are so many groups with divergent interests in society, the goal of promoting public interest is not easily definable. However, there is no other objective that is compatible with the democratic principles to which this nation subscribes. Under these circumstances, the balancing of interests and conflicts, which is impossible of exact accomplishment, is a necessary undertaking.

Another basic principle that should underlie the development of labor controls is that human rights, such as adequate wages, safe working conditions, and so forth, where in conflict with the rights of property, must prevail. Although the corporate form of business organization is recognized as a legal person, such an intangible creation of our society should not be protected in such a way as to harm individuals. Even where property is owned by individuals rather than a corporation, the principle of human rights over property rights should prevail. The right to hire workers, for example, at a clearly substandard wage should not be maintained. To protect this right would mean that, when many workers are not able to demand and get adequate wages, in times other than high prosperity,

<sup>35</sup> Kaltenborn, H. S., *op. cit.*, p. 201.

individuals will be harmed thereby; in addition, society as a whole will be affected adversely by substandard wages or other harmful conditions of employment.

With these basic requirements of control in mind, the means of effecting controls can better be evaluated. Theoretically, under the system of government followed in the United States, enacting legislation, judging its validity and applicability, and executing it are separate functions to be performed by separate branches of the government. However, as has been noted, much "lawmaking" is engaged in by both the courts and the executive. It is quite true that both branches restrict this legislating to emergency situations in which the legislature has not laid down adequate controls or when the enforcement of the laws is not satisfactory. But the question of when an emergency exists and when there is no law that meets the problem is open to a variety of opinions. Even if an adequate method of determining when an emergency exists could be devised, the practice of special orders, injunctions, or other stopgap measures would not be desirable. A more adequate method of social control would be to try to lay down rules and regulations that would prevent the emergencies from developing. Clearly, the economic health of the nation would be more sound if our governmental prescriptions were preventive rather than curative.

There is another reason why the emergency lawmaking of the executive and judiciary is not desirable. As has already been noted, such action comes only when a situation has grown out of hand. In such circumstances, the driving aim is likely to be one of reaching any acceptable solution rather than of insuring that justice is done. Although even in the action of the legislature, pressure groups make most law somewhat of a compromise measure, the element of expediency and compromise is probably not so great as it is in the settlement of disputes. Justice is not a clearly definable term, but legal guideposts that are set with justice in mind are likely to lay a foundation of more peaceful future relations. Management-labor relations based on governmentally pressured compromises and semi-forced settlements are not likely to be healthy. As an example of this fact, the great wave of post-World War II labor trouble is a case in point. During the war, normal collective bargaining gave way in many instances to essentially compulsory arbitration. Many issues, therefore, were not satisfactorily settled and remained as irritants, until the war was over. Therefore, in many plants and industries both parties were ready to thresh out a number of such issues that they felt had not been properly settled under government pressure. It is reasonable to believe that in the future

when emergency, high-pressure settlements are made they will continue to lay the basis for a future dispute.

Another reason for urging that economic controls be established by the legislatures is that the members of Congress are, theoretically at least, the representatives of the people, and are periodically required to place their records before their constituency if they seek re-election. Democratic principles demand that they come up for re-election frequently. Then, if they have not performed in a manner that suits the voters, they can be replaced. The executive is also responsible for his record, through the medium of election, although usually not as frequently as part of the legislature, but the judiciary does not have as direct a relation to the public.

For the reasons noted above, therefore, it is desirable that governmental controls come, to the greatest practical extent, from the legislatures. Regulations should be enacted with an eye to experience and an ear tuned to future needs and developments. They should be a part of a plan to meet social or economic problems that are likely to develop in the future. In fact, every piece of legislation is in itself a plan—a planned and required standard of behavior which many meet or surpass, but which others fail to meet. Such failure to meet the prescribed standard is considered socially undesirable—hence the legislative standard.

Effective government control requires an executive and a judiciary, but their activity should be non-legislative. It has been shown, however, that in the past federal, state, and local executives and the judiciary have acted to supplement legislation or to lay down their own rules when convinced that such action was necessary. This precedent should not be followed unless unavoidable, but it will require better law-making bodies than we have had to date to lay down a pattern of government rules that will remove all need for such action.

Executive or judicial regulations may boomerang. For example, many labor leaders and sympathizers who roundly applauded the ready intervention of F. D. Roosevelt in labor issues found themselves controlled by and consequently objected strongly to some of President Truman's intervention. But those who approve presidential lawmaking when it is in their favor must recognize that a difference in the attitudes or sympathy of the President will bring an entirely different type of control. If labor and its leaders embrace a policy in a pro-labor administration, they may be forced to accept the same policy or procedure during a reactionary administration when they will be injured by the practice. Of course, a similar responsibility rests on other groups in our society to act



consistently when the tides are running against them as well as when they are running in their favor.

### Questions

1. Why have government labor controls expanded so widely in the twentieth century?
2. How does executive action compare with legislation as a means of exercising government control?
3. What is the appropriate area of judicial action in the exercise of government labor controls?
4. Is legislation applying to selected groups in society, such as to women or children, rather than to all persons defensible? Why?
5. Federal labor controls are relatively much more important than they were a generation ago. Why has this expansion occurred? Is it likely to continue?
6. Adequate administration of legislation is not found in all jurisdictions and for all laws. What factors make it difficult to get and keep competent administrative staffs?

### CHAPTER III

## BRITISH AND EUROPEAN INFLUENCE ON AMERICAN LABOR CONTROLS

### The importance of precedent in legislative development

The merit of a historical approach to the study of labor law is questionable. It seems much more reasonable to assume that the attitudes of legislative bodies, the courts, and the executive are more a product of the economic and political conditions at a certain time than they are a product of precedent. Precedent, itself a product of a certain set of economic and political conditions and pressures, does, however, offer a very convenient excuse for making a certain decision or embarking on a certain course of action. Indirectly it also may influence government action, in that previously enacted laws or court decisions may have a marked influence on the conditions that exist at a given time and that in turn influence government policy.

It would be unwise, therefore, to impute to English and European legislation and court rulings too large a credit as an influence on the development of a body of American judicial doctrine.<sup>1</sup> However, since our culture was adapted in good part from the English, the legal customs of that nation of necessity influenced our legal and judicial development. This came about because our society experienced industrial developments similar to those of the English, but at a considerably later date than England; because she had passed through similar periods and dealt with the problems that arose it was natural to adapt from her experience. Secondly, the precedents of the English were convenient in many cases for use by American jurists to justify their rulings and opinions.

For these reasons, a brief examination of English legislation and court decisions is worth while to indicate the precedents from which the courts of the United States could draw. It will be seen that there were English precedents for many of the rulings of our courts. In some cases, with the traditional American flair for acting impressively, these precedents were expanded and made more restrictive

<sup>1</sup> In early American history, and to a certain extent throughout our history, American labor controls have sprung in large part from judicial rulings. This was especially true in the nineteenth century when there was little statute law to govern labor, so that court interpretation of the common law was the primary source of control.

of labor organization than in the mother country. This will be found to be especially true of the labor injunction.

It will be noted later that England, other European nations, Australia, and New Zealand also developed social legislation, such as unemployment and accident compensation, before the United States. In this field, as contrasted with that of controls of unions, the precedents have been adopted slowly and in many instances narrowly. In part this tardy adoption of social legislation resulted from the later development of an industrialized economy in this nation, but other factors seem to be involved; the strong individualistic philosophy of the American people, especially those most able to influence political action, had a strong retarding effect.

### Early English labor controls

If it be true that governmental controls are in good part a product of economic and political conditions, an examination of English precedent must take cognizance of conditions that created a need or demand for certain action. In tracing the development of the common and statute law of England, a logical point of departure is the period of the Black Death, which swept England in the middle of the fourteenth century; the economic disturbances arising from the plague paved the way for parliamentary controls. Prior to that time, the essentially agricultural economy of the manorial system, with its emphasis on a fixed status for the individual in society and with the immobility and relatively weak bargaining power of labor, had permitted local controls to give all of the guidance necessary.<sup>2</sup> However, the decrease in population resulting from the plague created a scarcity of labor that enhanced the bargaining power of the worker. The artisans were aware of this new power, and their demand, as individuals, for higher wages and the willingness of employers to pay them posed such a threat to existing economic institutions that legislation to control the exercise of power by workers was enacted. The result was the passage in 1349 of the Ordinance of Laborers<sup>3</sup> as an emergency measure. In 1350, the Statutes of Laborers,<sup>4</sup> confirming the earlier ordinance, was passed. Clearly, the act was passed to meet the needs and demands of the propertied classes. It was one of a long line of laws and court actions in England over several centuries that strove to solidify and maintain the position and power of the owners of property.

In denying to labor the right to exercise the new bargaining power, the legislation made it a criminal offense to demand or take wages

<sup>2</sup> For a brief summary of English labor legislation see: *Prentice-Hall Labor Course*.

<sup>3</sup> 23 Edw. III, 1349.

<sup>4</sup> 25 Edw. III, Stat. I, 1350.

higher than the maxima set by law—at first the pre-plague level and later a set schedule of wages. Details of labor contracts were closely regulated and the contracts were legally enforceable. Masters could be subject to either civil or criminal penalties for enticing a worker away from some other master.

Probably these laws were not well enforced. Generally speaking, an attempt to impose a new type of social control, and especially a control that is out of step with the trends of the time or the economic power of some party, is likely to meet with objection and evasion. However, the effectiveness of the enforcement is not of great importance “in the perspective of centuries.” Certainly the Statutes of Laborers set a guidepost for a philosophy toward labor that lasted for centuries.<sup>5</sup> Thus the passage of the emergency which begot the Statutes did not bring an end to generally restrictive labor controls. It was centuries before restrictive labor controls began to be dropped.

Two centuries passed between the enactment of the Edwardian Statutes of Laborers and the Elizabethan Statute of Apprentices. These two hundred years were filled with the social and economic changes that grew from the breakdown of the feudal economy, in which agriculture was the dominant form of enterprise, and the development of an economy centered in the towns, where handicrafts and trade were the more common form of economic effort. Under feudalism, the lack of freedom of the majority gave landholders the control over labor which they needed. With the breakdown of this type of society and of the social organization developed under it, legislative and judicial controls similar to the Statutes of Laborers evolved, intended to maintain the interests of the owners of economic wealth. Such control developed more and more as skilled workers began to combine to promote their economic interests. Generally, such concerted action by workers has been looked upon by the propertied classes as undesirable at all stages of history and has been opposed by whatever methods have proven effective and convenient. As regards the sixteenth century, two English labor historians believe that the dominant industrial policy was to find some regulatory authority that would perform the functions previously rendered by the craft guilds, and presumably prior to that institution by the social and economic stratification that was basic to feudalism.<sup>6</sup>

This philosophy flowered into the doctrine of mercantilism, which

<sup>5</sup> Landis, J. and Manoff, M., *Cases on Labor Law*, p. 3. Chicago: The Foundation Press, Inc., 1942.

<sup>6</sup> Webb, Sidney and Beatrice, *The History of Trade Unionism*, Revised edition, p. 48. London: Longmans, Green and Co., 1920.

was especially strong in England in the sixteenth and seventeenth centuries. The basic drive of the mercantilist thinkers was to devise methods of establishing and maintaining a favorable balance of trade. Therefore, government controls that would enable a nation to sell more than it purchased were desirable. Among the controls needed to realize this goal were labor regulations to ensure a cheap labor supply. A low wage level, adequate for subsistence and little more, was thought necessary to allow the export of low-priced goods to foreign countries.

In keeping with this philosophy, the Elizabethan Statute of Apprentices<sup>7</sup> of 1562 provided a comprehensive labor code. In part, it repeated earlier legislation and brought it up to date. The Webbs believe that the regulations of the medieval guilds were leaned on heavily in drawing up the Statute.<sup>8</sup> The new law retained the principle that both men and women were obliged to work either in industry or agriculture and that wages should be controlled. Wage rates were to be determined annually by justices in various localities in consultation with such other persons as they thought desirable. Taking or giving excess wages was punishable by fines or imprisonment, and a person unwilling to work at the prescribed wage could be imprisoned until he changed his mind. In an attempt to control the work of artisans, regulations regarding trade practices, materials used, and quality of products were included, as were specifications on the length of apprenticeship and the number of apprentices for each employer. In the opinion of one author, the Statute "was so broad and comprehensive that it established a system of national regulation of industry."<sup>9</sup> By present standards, at least, such stringent regulations were especially undesirable; and the administration of the act was equally objectionable. As has been noted, local justices were to determine wage rates that were then enforceable by heavy penalties. In addition, justices, sheriffs, and other officers were given power to settle disputes between masters and apprentices and "discharge apprentices from their apprenticeship or punish them for misbehaving."

While in many ways the Statute of Apprentices was restrictive and undemocratic, it indicated, perhaps, a slightly less antagonistic attitude toward labor than predominated previously.<sup>10</sup> Its avowed purpose was to "yield unto the hired person, both in the time of scarcity and the time of plenty, a convenient proportion of wages."<sup>11</sup>

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<sup>7</sup> 5 Eliz., Cap. IV, 1562.

<sup>8</sup> Webbs, *op. cit.*, pp. 48-49.

<sup>9</sup> *Prentice-Hall Labor Course*.

<sup>10</sup> Landis, J. and Manoff, M., *op. cit.*, p. 8.

<sup>11</sup> Webbs, *op. cit.*, p. 48.

Certainly the provision for periodic examination of wage rates made possible more flexibility than existed previously. However, there was still no recognition of any right of workers to engage in concerted action. Employees at that time, and for several generations, were destined to remain subject to strict regulation, both by laws such as the Statute and, as we shall see, by the courts.

### The development of the conspiracy doctrine

It is to be expected that in an economy in which legislative enactments were so devoted to the philosophy of widespread government control the attitude of the courts also would be unfriendly toward labor. The courts did much to develop principles, in good part centered around the doctrine of conspiracy, that seriously impeded the efforts of laborers to help themselves.

Without having, at first, the legislative basis for dealing with concerted action by workers to accomplish some goal, the courts developed a common law prohibition of combinations of workers. It is reported that prosecutions of workers for combination began as early as 1299.<sup>12</sup> Other such common law proceedings developed, and in 1360 piecemeal parliamentary action against combinations began, the first such action being directed against the masons and carpenters. Prosecutions for combined action continued with greater frequency. In 1424, another parliamentary attack on the combined action of masons was passed. Finally, in 1548, a more general legislative attack on combined action by workers was made in the Bill of Conspiracies of Victuallers and Craftsmen.<sup>13</sup> This enactment applied to "artificers, handicraftsmen, and laborers," a classification broad enough to cover all workers. The act forbade workers to "conspire, covenant, promise, or make any oath" that would bind them as to the amount of work done, the wage rate, or working on products that others had begun. Furthermore, if such conspiracy, covenant, or promise were made by "any society, brotherhood, or company of any craft," the combined group was automatically dissolved.

Thus, the doctrine of criminal conspiracy came in part from the common law and in part from statute law. On either basis it was aimed directly at the prevention of collective bargaining with its objectionable power to demand and secure concessions from employers that could not be gained by individuals. After the doctrine was well-established by judicial rulings and by the Act of 1548, Parliament was still prevailed upon to pass special enactments when a group of workmen became strong. Thus, in 1720, the master tailors

<sup>12</sup> Landis, J. and Manoff, M., *op. cit.*, p. 5.

<sup>13</sup> 2 and 3 Edw. VI, Cap. XV, 1548.

of London secured a special enactment to prevent their journeymen from organizing effectively for collective bargaining. This law prohibited contracts, covenants, and the like to raise the wages of subject workers or lessen hours of work. In addition, the work day was to be "from six in the morning until eight at night." Other similar instances occurred in other industries.<sup>14</sup> However, the next significant and broad legislation concerning conspiracies came in 1799 and 1800.

Before turning to the provisions of these laws, a brief examination of the landmark court case of *Rex v. Journeymen Tailors of Cambridge*<sup>15</sup> is in order. The journeymen tailors were indicted for conspiracy to raise their wages. The case was heard by the King's Bench. In its decision, the court found them guilty because "a conspiracy of any kind is illegal although the matter about which they conspired might have been lawful for them, or any of them to do, if they had not conspired to do it." Probably as a result of this ruling by the King's Bench, there were at later dates in the lower courts frequent prosecutions of striking workmen, the judicial action being for combination and conspiracy. Any collective action of workers was likely to be subject to a charge of conspiracy.

Nothing should be said to detract from the importance of the Combination Acts of 1799 and 1800. However, one fact is clear: they did not introduce any new or precedent-shattering principles. Basic changes in traditional court and parliamentary policy were to wait for an attempt to ease the already established doctrine of conspiracy which had done yeoman service in preventing combined action of groups of workmen.

### The Combination Acts

The Combination Act of 1799<sup>16</sup> was introduced by William Pitt, who was disturbed by the growth of combinations of workers despite the foregoing legislation and court attitudes. The bill was rushed through both houses of Parliament in less than a month, which gave little time for effective organization of opposition.<sup>17</sup> The act made "illegal, null, and void" combinations of any sort to raise wages, change hours of work, decrease the quantity of work done, or to induce others to join in a dispute. It was criminal to attend a meeting to plan action to attain any of the prohibited objectives, and persons could be imprisoned if found guilty of such action. Funds could not be solicited nor could donations be made

<sup>14</sup> Webbs, *op. cit.*, pp. 67-68.

<sup>15</sup> 8 Mod. 10, 1721.

<sup>16</sup> 39 Geo. III, Cap. LXXXI, 1799.

<sup>17</sup> Webbs, *op. cit.*, pp. 69-70.

for these forbidden ends. Trials under the act were to be conducted by a single justice of the peace.

The bill, supposedly only to prevent unlawful combinations, spelled out many specific restrictions on concerted action by workmen who came under the law. Although labor was not well-organized, the worker groups protested. To them the bill was unreasonably restrictive. On the other hand, employers were not satisfied with the regulation, considering it less than the action that should be taken by the government. So, with both parties objecting to the legislation, it is not surprising that it was revised in the following year.

The Combination Act of 1800<sup>18</sup> retained the philosophy of the regulation of the preceding year, but, contrary to the wishes of employers, it was not more restrictive than its predecessor; in fact it proved to be slightly more reasonable. The new law kept the anti-combination features of the previous law. However, two justices were substituted for the one that had previously judged violations of the act. The anti-picketing provisions were softened somewhat and provision was made in some instances for the arbitration of questions of wages, hours, and working conditions. Thus, although the revision of 1800 served to soften the previous legislation slightly, most actions of organized labor could be reached under the combination laws if so desired.

The law as it was drawn forbade combinations of employers as well as workers. However, for several reasons, it did not prove equally hard on both parties. As the law was administered, there were no reported cases of prosecution of a combination of employers;<sup>19</sup> not so with workmen, who were frequently punished for their combined action. In addition, even where employers were not combined into an association, the power of the individual employer was likely to be greater than that of his journeymen acting as individuals. Therefore, unless the workmen were permitted to form some sort of union they were not the economic match of their employers.

For almost a quarter of a century the Combination Acts of 1799 and 1800 were the official doctrine of the English government with regard to labor unions. This type of control was not consonant with the economic doctrine of *laissez faire* that had developed in the eighteenth century. Even so, freedom to organize was not granted readily to labor. Economic "laws" in labor relations were not so dependable as government regulation, if the government action regulated the right groups.

<sup>18</sup> 40 Geo. III, Cap. CVI, 1800.

<sup>19</sup> Webbs, *op. cit.*, p. 73.



Despite the continuing attempt of the government to prohibit labor organization, union action continued. The Webbs believe that most combinations of workers were left untouched until some employer was harmed enough by the union to take it upon himself to call for an application of the law.<sup>20</sup> Even with this halting method of applying the combination law, unions were faced with a real handicap. Although the law did not stop unions, it caused enough union leaders to be punished and enough restriction of the freedom of organization that the first quarter of the nineteenth century saw an increasing resentment against this restriction of economic action by worker groups.<sup>21</sup>

The movement for the repeal of the Combination Acts was led by Francis Place and David Hume, the former a tailor and liberal-minded employer and the latter a well-known philosopher and member of Parliament. Their carefully planned activities inside and outside of Parliament, coupled with a general public reaction against the stringent controls of labor organizations, culminated in the Act of 1824.<sup>22</sup> Place and Hume seized the opportunity; hearings were held quietly with a picked group testifying. The act was passed quietly and hurriedly;<sup>23</sup> it was pushed through so quickly that many persons were not aware of its enactment.

In essence, the Combination Act of 1824 repealed all of the earlier combination laws. Workers combining to raise wages, shorten hours, control the quantity of work, or to induce others to quit work were not subject to indictment or prosecution for conspiracy. However, violence or threats of violence wilfully and maliciously to keep persons from working for an employer still were criminal actions. Conspiracies to accomplish these ends still were indictable. Here, in essence, was *laissez faire* applied to labor relations.

As is true in many cases, complete absence of government controls did not work so well as had been hoped. The removal of so many controls at one time brought an unfortunate and unexpected result. There was a wave of union activity and work stoppages that aroused public opinion in opposition to the act. Consequently, in the following year Parliament acted to take away some of the liberties that they had so recently granted. This was done despite the

<sup>20</sup> *Ibid.*, p. 74. In some cases, employers or groups of employers went beyond tacit acceptance of unions and entered into agreements with organizations of their workers. While not a common action for the period, recognition and bargaining with union groups was not unheard of in England in the first quarter of the nineteenth century.

<sup>21</sup> Landis, J. and Manoff, M. *op. cit.*, p. 16.

<sup>22</sup> 5 Geo. IV, Cap. XCV, 1824.

<sup>23</sup> For a description of the planning and manipulations of Place and Hume see: Webbs, *op. cit.*, pp. 101-102.

attempts of Place and Hume, who fought a delaying action valiantly but not too effectively. The shipbuilding interests in particular were aroused and had the ear of some of the members of Parliament.<sup>24</sup> While considerable opposition was offered by trade unionists during the hearings, it was not enough to retain the Act of 1824 unamended. However, it was sufficient to bring modification of the bill urged by the shipowners.

The Combination Act of 1825<sup>25</sup> was, therefore, a compromise that retreated considerably from the *laissez faire* philosophy of the Act of 1824 but did not replace all the controls existing prior to 1824. The act repealed the 1824 enactment, thus once more making union action subject to indictment under the conspiracy doctrine of common law. Workers were permitted to meet and consult about wages and hours, and agreements fixing wages and hours were allowed. Picketing that caused violence or threats and intimidation was criminal; violence was not lawful under the foregoing act, but this one hedged it about more closely; for all practical purposes picketing was unlawful, notwithstanding some court decisions to the contrary.

The Act of 1825 was softened somewhat in 1859<sup>26</sup> by an enactment directed specifically at amending and clarifying the Act of 1825. It provided that a person was not to be deemed guilty of molestation or obstruction under the previous act, nor liable for indictment for conspiracy merely because of being a member of a union or peaceably trying to get others to quit work. This new law, however, was not controlling in all cases. In 1867,<sup>27</sup> it was held that, even if picketing were peaceful, it might have "a deterring effect on the minds of ordinary persons" and, therefore, be outside the law. While the doctrine of this case was not followed consistently, it seemed to point up the fact that the relation of unions to the law sometimes was unclear.

Even though the common law of conspiracy was again applicable, it was not again used with the same effect. Since union meetings and trade agreements that dealt with matters of wages and hours were lawful, not all combined action was automatically a conspiracy. However, judges had considerable leeway to decide when threats and intimidation were involved. Union action to secure the dismissal of a person deemed unfriendly to the union could still be held as illegal action that threatened or intimidated.<sup>28</sup>

<sup>24</sup> *Ibid.*, pp. 103-105.

<sup>25</sup> 6 Geo. IV, Cap. CXXIX, C. 1825.

<sup>26</sup> 22 Vict., Cap. XXXIV, 1859.

<sup>27</sup> *Regina v. Druitt*, 10 Cox. C.C. 592, 1867.

<sup>28</sup> *Regina v. Hewitt*, 5 Cox. C.C. 162, 1851. For a summary and evaluation of the act see: Landis, J., and Manoff, M., *op. cit.*, pp. 108-112.

Although unions did not enjoy the freedom under the Act of 1825 that they had experienced temporarily under the Act of 1824, the political, social, and economic climate of the second and third quarters of the nineteenth century was such as to allow a growth of unions and union activity. But at times it was growth under considerable difficulty.

### The restraint of trade doctrine

One result of the weakening, by the Act of 1825, of the common law doctrine of conspiracy was the growth in importance of the doctrine of restraint of trade. Until 1824 concerted action had been indictable as a criminal conspiracy at common law, so there was no need to prove restraint of trade in order to condemn the union action. But with the weakening of the conspiracy doctrine in 1824 and 1825, judges began to find that combinations resulted in a restraint of trade and were, therefore, unlawful.

In view of the continued restriction of union action through court decisions, the unions began to agitate for a modification of the existing law. As a result, a commission of inquiry was set up in 1867 to study the need for revisions of the laws regulating workers' organizations.<sup>29</sup> The report of the commission, while not an especially strong and positive one, resulted in the enactment of the Trade Union Act of 1871.<sup>30</sup> This act provided in part that "the purposes of any trade-union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful, so as to render any member of such trade-union liable to criminal prosecution for conspiracy or otherwise," or "so as to render void or voidable any agreement or trust." Other provisions of the act established a system of registry for unions and dealt with the responsibility of officers. For our purposes, however, the act is of greatest importance because it removed the union from the effective application of the restraint of trade doctrine. But, although restraint of trade was no longer applicable, there still was the possibility, somewhat restricted by the Act of 1825, of applying the common law doctrine of criminal conspiracy. For protection against the conspiracy doctrine the Act of 1875 should be examined.

The Conspiracy and Protection of Property Act of 1875<sup>31</sup> provided in part that "an agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime." Further it was stated that "an act done in pur-

<sup>29</sup> Landis, J., and Manoff, M., *op. cit.*, p. 23.

<sup>30</sup> 34 and 35 Vict., Chap. 31, 1871.

<sup>31</sup> 38 and 39 Vict., Chap. 86, 1875.

suance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable." Violence and intimidation were still unlawful, as was "wilful and malicious" breach of contract that resulted in injury to persons or deprived localities of gas or water. The act, relatively brief and to the point, clearly intended to free peaceful picketing from indictment as criminal conspiracy while, quite reasonably, refusing to sanction violence or intimidation or certain public injury. Despite the provisions of the law, the courts held on occasion for many years to come that it was criminal to picket peacefully to persuade others to quit work.<sup>32</sup>

### Damage suits against British unions

The latter part of the nineteenth century saw the rise of another means of controlling trade union activity. The Act of 1875 made no attempt to protect against civil action for damages, so suits for damages were brought in considerable number.<sup>33</sup> The practice of bringing suits for damages grew and developed in the closing years of the century and reached its peak in two court decisions of 1901. These decisions were rendered in the cases of *Quinn v. Leatham*<sup>34</sup> and *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*.<sup>35</sup> The case of *Quinn v. Leatham* arose out of an attempt of a butchers' union in Belfast to force an employer to hire union men instead of certain employees then working; the union also refused to admit to membership the persons working for the proprietor of the slaughter house. A boycott resulted in a loss of one particular customer of Leatham and suit was brought for damages against the union leaders.

Lord Macnaghten stated in his opinion, when the case came before the House of Lords, that conspiracy to injure resulting in damage gave grounds for civil liability. As for the Conspiracy and Protection of Property Act of 1875, it was his view "that the provision . . . which says that in certain cases an agreement or combination is not to be indictable as a conspiracy, has nothing to do with civil remedies."<sup>36</sup> The ruling in this case showed that suits

<sup>32</sup> Landis, J., and Manoff, M., *op. cit.*, p. 25.

<sup>33</sup> U. S. Department of Labor, *Report of the Commission on Industrial Relations in Great Britain*, p. 59. Washington, D. C.: U. S. Government Printing Office, 1938.

<sup>34</sup> Appeal Cases 495, 1901.

<sup>35</sup> Appeal Cases 426, 1901.

<sup>36</sup> This ruling is an interesting contrast with *Allen v. Flood*, Appeal Cases 1, 1898. In that case, Allen, a union representative, succeeded in getting Flood and another man dismissed from a ship repair company because they were not members of the boilermakers' union. Allen was fined £40 by a lower court, but on appeal the ruling was reversed.

for damages might be brought on any conspiracy to injure, and by not too great a stretch of the imagination most work stoppages could be construed as an attempt to injure the person or organization against whom the stoppage was directed.

The Taff Vale case arose out of a strike in 1900 in which violence had occurred. The company sued the union for damages against the advice of attorneys who based their advice on the fact that the union was not a corporate body. Despite this fact, the Law Lords held that a union was liable for damages done by its members during a strike.<sup>37</sup> Thus the Quinn case made union members responsible as individuals for union actions and the Taff Vale case made the union responsible as an entity. The trade unions again were faced with the threat of severe restriction from a relatively new source now sanctioned by the Law Lords. Again came a demand for revision of the law. Trade unionists were very active in the general elections of 1906, electing or aiding in the election of many liberal candidates who sponsored changes in the existing law.

As a result of this activity, the Trade Disputes Act of 1906<sup>38</sup> was passed. That act applied the same rules to civil conspiracies as had been applied to criminal conspiracy by the Act of 1875. This was done by adding to the earlier act a provision that "an act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable." In addition, the act removed restrictions from peaceful picketing. It should be kept in mind, however, that trade union actions that are awarded legal protection are those done "in contemplation or furtherance" of the trade dispute.

By 1906, British trade union control had reached much the status that it was to retain up to World War II, although other enactments were necessary to clear the way for unions to make political contributions<sup>39</sup> and for the establishment of an industrial court. Experience with the general strike of 1926, however, did bring significant legislation, although it has not as yet served as a precedent for regulation in the United States.

A strike of coal miners in 1926 climaxed a period of unrest and led to a general strike. The general strike was called off after nine days, although the miners' stoppage continued for some time. Even

<sup>37</sup> For a review of the issues leading to the case see: Webbs, *op. cit.*, pp. 600-608. See also: *Report of the Commission on Industrial Relations in Great Britain*, *op. cit.*, p. 59.

<sup>38</sup> 6 Edw. VII, Chap. 47, 1906.

<sup>39</sup> 2 and 3 Geo. V, Chap. 30, 1913.

though industrial peace was restored relatively promptly, the potentiality of such stoppages was disturbing. Consequently, the government acted to make them unlawful.

It is not clear that such action was necessary; it will be remembered that the Acts of 1875 and of 1906 had legalized only that action which was "in contemplation or furtherance" of a trade dispute. Despite the doubtful legality of the action, the Trade Disputes and Trade Unions Act of 1927<sup>40</sup> was passed, modifying earlier laws regulating trade union actions. As Parliament phrased it in the act, it was to be "construed as one with the Trade Union Acts, 1871 to 1917." As to stoppages henceforth to be illegal, the law stated that any strike or lockout was illegal if it "(1) has any object other than or in addition to the furtherance of a trade dispute within the trade or industry in which the strikers are engaged; and (2) is . . . designed or calculated to coerce the Government either directly or by inflicting hardship upon the community." As a trade dispute was defined, sympathetic strikes were, in effect, unlawful. Mass picketing also was illegal. Thus, a slight backward step was taken from the freedom extended unions after 1906. However, the statute of 1927 was not indefensible. It did not prevent unions from strengthening themselves and bargaining with employers. It did establish the principle that public interest was paramount. While various interpretations could be made regarding when a strike was not in furtherance of a dispute or when it was intended to coerce the government, the stated principle was in keeping with the theory that government is to protect the interests of the majority of the people.

One other British precedent for American labor controls remains to be noted. This was the issuance of an injunction in a labor dispute. Such an order was issued in the case of *Springhead Spinning Co. v. Riley*.<sup>41</sup> There were a few other recorded cases of injunctions issued in labor disputes, culminating in the Taff Vale case. However, the precedent was never used extensively in Great Britain, and since the passage of the Trade Disputes Act of 1906 no such rulings have been recorded.<sup>42</sup> In the United States, however, the history of the labor injunction is not so simple. As will be seen later, court orders in labor disputes have been used extensively; their use has done much to shake the faith of many workers in the impartiality of the government.

The foregoing sketch of British controls over labor-management

<sup>40</sup> 17 and 18 Geo. V, Chap. 22, 1927. Repealed by the Trade Disputes and Trade Unions Act, 1946, 9 and 10 Geo. VI, Chap. 52, 1946.

<sup>41</sup> Law Reports 6 Equity, 551, 1868.

<sup>42</sup> *Report of the Commission on Industrial Relations in Great Britain, op. cit.*, p. 59.

relations shows that the United States has had precedent for almost every type of control that it has seen fit to try. However, it must be kept in mind that it took more than British precedent to cause our government to follow a certain course. Social and economic conditions necessitating some particular type of action also were a prerequisite.

Another interesting observation may be made. Willingness to apply a theory of *laissez faire* to labor did not come as quickly as the application of the doctrine to business. In the nineteenth century, and even before, the tide of *laissez faire* was running strongly in England, especially with regard to government control of business. But in the first quarter of the nineteenth century, labor organizations were subject to the very strict Combination Acts of 1799 and 1800. And during the second and third quarters of the century they still were subjected to numerous court actions based on the doctrine of conspiracy. In fact, it was not until early in the twentieth century that unions were left relatively free of government controls.

#### Legislation protecting against economic risks

At the same time as the developments described above, England and other nations of northwestern Europe were setting an example for the United States in another field; this was in the establishment of protective labor and social legislation. This precedent, it will be seen, the United States followed quite tardily; almost all legislation such as old age assistance, accident compensation, unemployment compensation, and other similar laws appeared first in Europe or in Australia. This fact, however, is not entirely attributable to a lack of social consciousness or sympathy in America. Industrial capitalism developed in our country at a later date than in Europe, and even as it developed there were more escapes or alternative opportunities for the aged, the unemployed, and the dissatisfied. While there was some reason for our lethargy,<sup>43</sup> there was no need for the extreme situations into which we let ourselves drift before taking legislative steps to correct the situation. By the time we did face reality sufficiently to develop government programs offering some social protection, we had much English and European experience from which to profit. Let us note some of these foreign experiments.

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<sup>43</sup> The lethargy was in part a result of the character of the nineteenth century American labor movement, which, in its political action, aspired either to the complete change of our economic and political system or to securing certain specific rights, such as free schools or voting rights. Little thought was given to social legislation such as that listed above. Our federal form of government contributed to the retardation. Even up into the twentieth century there was some feeling that such legislation might lessen the value of unions to their members.

With regard to the problem of unemployment, the need for some kind of standardized program of public assistance for workers unable to find work was recognized in Europe before the end of the nineteenth century. An unsuccessful attempt at public unemployment insurance on a city-wide basis was begun in Berne (1893) and in St. Gall (1895), Switzerland. The earliest successful attempt at a public program for unemployment relief came in the form of municipal or state subsidies to unions that had established a plan for paying unemployment insurance to their members. This plan, known as the Ghent Plan (from the Belgian city in which it originated), was adopted in a number of cities and by some European nations prior to World War I, and some further extension of the plan followed the war.<sup>44</sup> Because all unions did not take advantage of the subsidies and not all workers were members of labor unions, the coverage provided by this type of program was far from adequate.<sup>45</sup> In addition, the plans suffered from the disadvantage that employers did not bear directly any of the cost of the payments made to workers; consequently, there was not as much incentive to keep down unemployment as there might have been if employers were helping directly to defray expenses incurred under the plan.<sup>46</sup>

Adequate social programs for protection against unemployment demand a state-wide or nation-wide plan that covers all workers in the industries subject to the law. Such a plan was tried first on a nation-wide basis in Great Britain under the National Insurance Act of 1911. In the original act workers in only seven industries were covered, but subsequent modifications in 1916, 1920, and 1936 broadened the coverage to all important wage groups other than domestic workers and public employees. The cost of the program is borne jointly by employers, employees, and the government. The administration of benefits is tied-up with the employment exchange system, and payments are contingent upon registration for work and inability to provide suitable work for the unemployed person. Regulations as to the size of benefit and the duration of payments were established, but these are not important to an understanding of the general principles of the British program.

<sup>44</sup> Commons, J. and Andrews, J., *Principles of Labor Legislation*, pp. 293-294. New York: Harper and Brothers, 1936.

<sup>45</sup> The subsidy was usually about one-half of the payment made. It could be, but rarely was, made to voluntary organizations other than trade unions. Coverage of the plans was small: reportedly, in 1935, slightly over 4,000,000 workers in 11 European countries. See: Millis, H. A. and Montgomery, R. E., *Labor's Risks and Social Insurance*, p. 123 (Volume II of the three-volume series entitled *Economics of Labor*, hereinafter cited as Millis and Montgomery, Volume II). New York: McGraw-Hill Book Co., Inc., 1938.

<sup>46</sup> For an analysis of the evolution of unemployment compensation programs from the origins up to 1930 see: Armstrong, Barbara, *Insuring the Essentials*, pp. 485-531. New York: The Macmillan Co., 1932.



The compulsory plan originated by the British was copied by a number of nations in Europe and other parts of the world. Prior to the second World War, eleven countries<sup>47</sup> had adopted some type of compulsory plan. The plans varied widely from that of Britain in coverage, rules of eligibility, methods of financing, and other provisions. The idea of compulsory coverage of all persons in certain categories and of at least joint financing by employers and workers, and frequently the state, was included in all, however. Not only did the British plan leave its mark on the programs of many other European nations, but when the states of this nation began to establish unemployment insurance plans, as a result of the terms of the federal Social Security Act, the compulsory plans of Europe offered valuable experience on which to draw. But it took approximately a quarter of a century for the United States to step onto the path blazed by Britain in 1911.

Modern industry with its mechanized processes creates many conditions out of which accidents may occur. Until late in the nineteenth century a person injured on the job was out of luck unless his employer saw fit to compensate him for the accident. Certainly in many instances such was not the case. In the latter part of the nineteenth century, a philosophy began to develop that the state should extend aid to those injured on the job and that the employer should be expected to bear part or all of the expense of such programs. The cost of injured manpower should be a part of the cost of production, just as should a broken machine.

In the enactment of workmen's compensation laws Germany led the way. After two unsuccessful legislative attempts at provision of compulsory insurance against accidents, such a law was passed in 1884.<sup>48</sup> The first law applied only to manufacturing and mining and was at first rather restrictively applied only to industrial accidents. Gradually the law was extended to cover more types of injury and more occupations. The cost of the insurance was placed on the employer.<sup>49</sup> Benefits included medical benefits, cash benefits usually equaling two-thirds of the wages lost because of the disability, and death benefits in case of fatal injury.

Probably the customs of England with regard to the compensation of injured workmen left a more indelible mark on the practices followed at a later date in the United States. In Great Britain, prior to the enactment of a compensation law, it was very difficult for an injured workman to force an employer, through legal action, to

<sup>47</sup> Austria, Bulgaria, Germany, Northern Ireland, Irish Free State, Italy, Poland, Queensland (Australia), Switzerland, Canada, and Yugoslavia.

<sup>48</sup> Commons, J. and Andrews, J., *op. cit.*, p. 233.

<sup>49</sup> Armstrong, B., *op. cit.*, pp. 226-227.

make any payment for injury no matter how severe. If the counsel for employers could prove that (1) the worker knew of and assumed the risk of the job, or (2) that the employee's negligence contributed to causing the accident, or (3) that a fellow worker caused the accident, the court would not uphold a claim for damages. These same "common-law defenses" against suits for damages were used frequently in the United States.

The British compensation law was enacted in 1897 and, as in the case of the German law, was gradually broadened in coverage. In an amendatory act of 1906, the British provided compensation for a list of six occupational diseases, being the first nation to make special reference to this problem. One interesting fact about the British law is the failure to provide medical benefits under the compensation laws: however, since 1911 the compulsory health insurance program has served as a substitute for such a provision in the act.<sup>50</sup>

Meanwhile, other European nations had been following the German example. In the 1890's, Norway, Finland, France, and Denmark as well as Great Britain enacted compensation laws. In the first decade of the twentieth century, eight more European nations and some of the Canadian provinces and Australian states began similar programs. Prior to the first World War, a few of the states of our own nation had enacted such protection. It will be seen, however, that the Supreme Court did not consider such laws constitutional until 1917<sup>51</sup> when they were held a valid exercise of police power.

Dependent old age is another problem that has been emphasized by the development of an industrialized economy. Workers in handicraft or agricultural pursuits can slow the tempo of their work as they grow old, but even at a slower pace they are not useless. But if the speed of a worker must be such as to keep up with others around him or with a production line or machine, such tapering off is impossible. This situation shows itself especially when older workers find themselves out of jobs for some reason and begin to look for employment. Another complicating factor arises out of the relatively low incomes of much of the population in every country, with the consequent inability of workers to save enough, even if they act as rational "economic men," to take care of periods of no income. Income can be provided for such people by relatives or friends, charity, public or private pension plans, or by old age or retirement insurance. Adequate provision for all or even a ma-

<sup>50</sup> *Ibid.*, p. 246.

<sup>51</sup> See below, Ch. VIII.

jority of those who need help in dependent old age demands some sort of government program.<sup>52</sup>

The first country to adopt a system of state pensions for its needy old was Denmark, which embarked on such a plan in 1891.<sup>53</sup> Similar-type plans were adopted in other countries of northwestern Europe, in Australia, and elsewhere prior to World War I. In general, the plans provided aid only to those needy who owned little or no property and whose incomes were below certain set levels. As will be seen later, this type of aid to the aged was begun in various states of this country long before old age and survivors' insurance ever was seriously proposed.

Meanwhile, Germany had enacted a different type of measure dealing with dependent old age; this was a law providing a compulsory system of old age assistance. The first law was enacted in 1889 and was broadened and liberalized in 1899 and 1911.<sup>54</sup> This plan required the cost of the insurance to be borne jointly by employers and workers. Although a system of compulsory insurance seems a more desirable method of dealing with dependent old age than is a non-contributory pension plan, the latter developed more prior to the first World War. After the war, however, the compulsory insurance plans became more popular. By 1925, almost all European states and some others elsewhere had old age protection plans; four-fifths of the plans were of the compulsory insurance type.<sup>55</sup> It may be of interest to note that in that year Great Britain, where a pension plan had been enacted in 1911, shifted to a compulsory insurance program. It seems probable that the British choice of a pension system up to 1925 may have had influence on attempts in the United States to meet the same problem. About one-half of the states in the union had old age pension plans prior to the time that steps were taken to establish an old age retirement insurance system. Subsequent discussion<sup>56</sup> will show that many of the state pension plans were extremely inadequate and that the

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<sup>52</sup> In this and following chapters the term "pension" is used to indicate payments made, usually by government although they might be from private concerns, to indigent persons on the basis of demonstrated need, but without regard to previous earnings or other accomplishments. "Old age insurance" refers to payments made after retirement on the basis of previous contributions rather than need. Deductions, usually from both workers and employers, are paid into an insurance account. The retired person has a right to regular payments, the amount varying with previous earnings or payments, because of the fact that payments have been made to his or her account.

<sup>53</sup> Commons, J. and Andrews, J., *op. cit.*, p. 276.

<sup>54</sup> Armstrong, B., *op. cit.*, p. 400 ff. See also: Millis, H. A. and Montgomery, R. E., *op. cit.*, Vol. II, p. 372 ff.

<sup>55</sup> Armstrong, B., *op. cit.*, p. 413.

<sup>56</sup> See below, Ch. XIX.

general protection under the old age and survivors' insurance sections of the Social Security Act did not come until 1935.

A similar story can be told concerning sickness insurance, a type of social insurance which has not yet been developed by our federal government, the first experiments with which were made by the states only in the 1940's. In 1883, Germany enacted the first compulsory sickness insurance law for workers in a restricted number of listed hazardous industries. For the workers covered in these industries, the cost of the insurance was placed on employer and worker. Before the first World War, Austria, Hungary, Norway, Serbia, Russia, Rumania, Luxemburg, and Great Britain had established compulsory health insurance for various groups of their workers. In addition Sweden, Denmark, France, Belgium, Switzerland, and one Australian state had set up subsidy plans to aid voluntary health associations or in some cases smaller governmental units in extending sickness protection.

#### Minimum-wage controls

In still another field, government regulation of a knotty economic problem has developed slowly in this country, namely: the establishment of minimum wages for low income groups. The pioneer legislation in this field came from the Australian province of Victoria in 1896, when a law was passed requiring the setting of minimum wages in six industries by wage boards provided for under the act. Other states of Australia followed shortly. In Great Britain, a similar provision for determination of minima by special trade boards in four industries was enacted in 1919. Other industries were covered later. Minimum-wage laws did not spread through Europe as extensively as some other types of social legislation, but controls over wages in certain low-paying industries were enacted in France, Norway, Austria, Germany, Czechoslovakia, and other countries.<sup>57</sup> While these laws were not a complete answer to the problem of low wages, they were experiments that had to be made as it became clear that a *laissez faire* philosophy of government resulted in the payment of wages inadequate (from the viewpoint of the provisions of a reasonable standard of living) for many persons. Although states in the United States began to develop minimum-wage laws for women and children early in the twentieth century, it was not until 1937 that the Supreme Court held such laws constitutional. Minimum-wage laws for men were slightly more tardy in their appearance in the United States.

<sup>57</sup> Armstrong, B., *op. cit.*, pp. 17-170, scattered data. See also: Commons, J. and Andrews, J., *op. cit.*, pp. 48-54.

### Use of English precedents in the United States

This review of the development of the common and statute law of labor relations in England and other countries emphasizes that the United States has been a follower rather than a leader. The reason for the conservatism of the legislators and the courts is rooted in a number of factors. The combination of these factors has created in legislators, the judiciary, and the general public as strong a spirit of individualism as existed in any part of the civilized world.

Probably the greatest reason for this philosophy was that the Americans of the nineteenth century had the heartland of a great and wealthy continent to exploit. At first the task was that of exploiting the natural resources of the land. Then, as this exploitation proceeded with breathtaking rapidity and waste, there was great economic opportunity to exploit in establishing the industry, the transportation network, and the trading centers of the land. These great economic opportunities meant a relative shortage of workers with resultant high wages. In addition to this relatively advantageous position of American labor, the existence of free or cheap land served as an escape valve for some of those who became discontented. And the frequent examples, usually well publicized, of an individual rising from poverty to great wealth added their weight to fashioning a philosophy that the government that kept hands off economic enterprise was the one that was best.

In the latter part of the nineteenth and in the twentieth centuries, conditions began to change. The physical frontier disappeared, the most rapid exploitation came to an end, and, with the tendency of previously established economic empires to continue, the rags-to-riches movement became less frequent. But the dominant individualistic philosophy did not change so rapidly as the economic conditions. And where there has been a tendency for that philosophy to change, strong and concerted efforts have been made to perpetuate it.

Groups that have been and are especially active in the attempt to perpetuate the doctrine of individualism are business organizations, the press, most agricultural organizations, and in many instances the schools and the churches. Generally, although not always, the groups most strongly representing this point of view are those possessing or connected with considerable wealth. As a result, the prevalent, although far from unanimous, attitude of the American people is one that resents government control of economic enterprise and believes strongly in the ability of the individual to get ahead if left alone. Public opinion has been molded effectively, although

perhaps without strict realism in terms of twentieth century conditions.

In view of such a philosophy it is easier to understand the alacrity and effectiveness with which we followed some of the precedents reviewed in this chapter and followed others reluctantly or not at all. With strong individualism prevalent it is small wonder that the courts seized upon the doctrines of conspiracy and restraint of trade, especially upon the judicial tool of the injunction in labor disputes. Subsequent chapters will show the effectiveness with which some of these precedents were used. And also it is easy to understand how such a philosophy would delay, even more than the tardy industrial development would explain, the adoption of social legislation that extends a helping governmental hand to less fortunate individuals. The theory of the individualist is that those who do not get along have only themselves to blame and not the economic or political structure in which they live. If this be true, then a government policy of hands off is defensible.

In summary, Europe, and especially England, gave the United States examples of strict control and persecution of workers, and later of a more liberal attitude and of an acceptance by government of responsibility to aid those members of society who suffer economic misfortune. Of the wide variety of precedents, some were followed quickly and enlarged and extended, others were not. The economic philosophy of the time and the severity or lack of economic maladjustments furnish the key to our utilization or ignoring of the examples set for us.

### Questions

1. Why have English judicial precedents had so much influence on decisions of courts in the United States?
2. With regard to labor-management relations, have there been periods in American economic history comparable to that which led to the Statutes of Laborers in England? Explain.
3. Why did the English not utilize the labor injunction so extensively as did the courts of the United States?
4. Why did social insurance legislation, such as unemployment compensation laws, develop so slowly in this nation as compared with the nations of Europe?
5. Did the English practice the doctrine of *laissez faire* in their governmental policies regarding labor-management relations as extensively and as early as they did in business controls?
6. Compare or contrast the Combination Acts of 1824 and 1825 with regard to the philosophy underlying the legislation and the provisions of the two laws.

## CHAPTER IV

### SOURCES OF AND LIMITATIONS ON GOVERNMENT LABOR CONTROLS

#### Nature of government controls

It has been pointed out earlier that Great Britain gave the government of this nation precedents for many types of labor controls and social legislation. Our government is based, however, upon a written Constitution in which there are certain basic powers and limitations established that, despite its ambiguity and variety of possible interpretations, affect the manner in which those precedents can be followed. However, judges who must, in the final analysis, determine whether legislation and controls are consonant with the Constitution render widely varying opinions from time to time and in one situation and another. It is necessary to examine pertinent sections of the Constitution in order better to understand the manner in which state and federal governments exert their controls over or guidance of labor.

Although the United States is one nation, the laws and regulations to which its citizens are subject come from a number of governmental sources; the federal government, the state governments or their subdivisions, and, within these jurisdictions, from law-making bodies, administrations, and the courts. If the legislation is federal, it must be in keeping with a power conferred by the Constitution, reasonably necessary for the execution of one of the delegated powers, and not a violation of the restrictions on the power of Congress that are included in the Constitution. Requirements for state controls are slightly different. They must be reasonable, related to the public welfare, not in conflict with a field expressly reserved for federal control, not an exercise of power denied to the states by the federal Constitution, nor in violation of the state constitution.<sup>1</sup> These requirements of federal and state law may be used in drawing a rather indistinct line between proper areas of control for state and federal governments.

Perhaps it is well before turning to specific clauses of the Constitution to examine briefly certain commonly held misconceptions.

<sup>1</sup> Ellingwood, A. R., and Coombs, W., *The Government and Labor*, p. 20. New York: A. W. Shaw Co., 1926.

Frequently, when economic regulations are discussed, the argument is voiced that the people have certain inalienable rights that cannot be taken from them. By this it is meant that persons have a just claim, by reason of legal principles and the social and economic customs of our society, to certain privileges. Some of the "rights" commonly thought of when the term is used are life and liberty and freedom of speech, press, and so forth. Many other freedoms are commonly brought to mind when we speak of rights. Although there are many instances in which individual liberties have not been adequately protected in this nation, it is certainly true that the United States is committed to a high degree of protection of the freedom of the individual to believe and act as he sees fit. But where individual actions may be such as to be detrimental to public welfare, society has a right and duty to circumscribe or take away individual freedom of action. In other words, inalienable rights can lose their inalienable status.

This terminology, taken from the Declaration of Independence, does not appear in so many words in the Constitution, although a cursory examination of the fifth and fourteenth amendments would seem to validate the opinion. It is important to realize, however, before examining the Constitution that it does not seek to establish any rights that cannot be taken away. Either the state or federal government may deprive a person of any right, even life itself. Under our form of government, certain rights, such as life, liberty, property, free speech, free press, freedom of assembly, and so forth are highly protected but they are not inalienable. In order to deprive a person of one of these highly protected rights the government must observe due process of law.<sup>2</sup> Essentially, the observance of due process of law requires that good, reasonable, accepted legal practice be used in the proceedings by which some protected right or privilege is taken away and that the action taken not be arbitrary. Thus, persons are protected from arbitrary denial of certain rights, and no more.

A second misconception is that the federal government is able to regulate at will in order to "promote the general welfare." This is not the case. The federal government is one of delegated powers; it may exercise only those powers specifically given to it or implied in the Constitution. Governmental powers that are not expressly delegated to the federal government nor denied to the states are reserved to the states and are to be exercised by them. Therefore, the powers of the states—the residual powers not the prerogative of the Congress—are much more vague and indefinite than

<sup>2</sup> See Commons' and Andrews' discussion of this point: *Principles of Labor Legislation*, pp. 506-509.



those of Congress. As will be shown, the states are assumed to have the police power to regulate for the general welfare. In view of the fact that the term "general welfare" is incapable of exact definition and that its meaning may vary from time to time, it will be seen that the power of the states is highly elastic, depending in large part on the social and economic philosophy of the legislature and the judiciary.

Finally, it should be noted that the United States Supreme Court has the final word on whether the states or federal government act within the spheres that the Constitution indicates are properly theirs. After this decision is made in test cases, the Court still must determine whether the regulation observes due process of law; that is: whether the action is reasonable and not arbitrary and, in some disputed cases, whether the law applies to certain persons or problems or does not.

#### Sources of federal control: tax power

There are two broad bases on which federal lawmakers can enact labor legislation. These bases are the power to tax and the power to regulate interstate or foreign commerce. As to the power to tax, Congress is given the authority "To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."<sup>3</sup> However, it is provided also that "No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census . . . ."<sup>4</sup>

There is nothing in this grant of power that requires that taxes be levied solely to raise revenue. Congress may, if it sees fit, levy taxes whose primary purpose is to accomplish some social or economic control rather than to raise revenue. But the question may arise as to the extent that a tax must be a revenue-raising measure before it can stand on the statute books. It is clear that an unlimited power to tax in any manner would give extensive control of the economy. In some cases, the Supreme Court has been inclined to ignore this fact, whereas in others it has chosen to look behind the tax provisions in order to determine whether they were to raise money or to accomplish some control.

While it is not clear that Congress has the power to phrase its tax programs in such a way as to necessitate, or at least strongly encourage, certain desired reforms for the general welfare, it is clear that Congress may elect to spend the proceeds of taxation, or bor-

<sup>3</sup> Constitution of the United States, Article I, Sec. 8.

<sup>4</sup> Constitution, Article I, Sec. 9. However, the sixteenth, or "income tax," amendment allowed taxes on incomes "without regard to any census."

rowing, to "provide for the common defense and general welfare." Thus it will be seen that there is in the expenditure of funds a method by which Congress has been able to induce the states to enact desired legislation. It will be seen later that, although some states previously had enacted such laws, the universal application of old age pension laws came only after the federal government offered to every state enacting an adequate law a subsidy to meet part of the cost. Other types of social assistance have been encouraged in the same way. This indirect method of control is not so desirable, perhaps, as one in which control or assistance is applied directly, but because federal grants are contingent on programs that are acceptable to designated federal agencies, a considerable degree of guidance over the program can be exercised. This ability, coupled with a willingness on the part of the Supreme Court of recent years to allow taxes that clearly were levied with certain social controls as a goal, has made the taxation and spending power of the federal government an important one. In terms of labor legislation, however, it is less significant than the interstate commerce clause.

#### Sources of federal power: the commerce power

The power of Congress "to regulate commerce with foreign nations, and among the several states . . ."<sup>5</sup> has proven a very elastic one. This is due to the fact that there is no clear and undisputed statement of that which may be controlled under the power to regulate interstate commerce. The power to regulate has been construed to include keeping open the channels and prohibiting or minimizing interruptions of commerce. With this broadened concept of the power, what may the Congress control? Clearly, the transportation of goods across state boundaries is included. But much can happen before goods move in interstate commerce, or after the movement has ceased, that will affect commerce, such as a work stoppage in a manufacturing plant. Factors with no direct relationship to the transportation of goods may have an effect, such as the shortage of purchasing power arising out of a depression or an inflationary price spiral. Since there is general knowledge of such relationships, they need not be labored further. Granting the relationship, how far beyond the actual movement of goods may Congress go in its regulation of commerce?

There is another way of looking at interstate commerce that further complicates the problem. In one sense, the extraction of raw materials is an intrastate function, their transportation (if beyond state boundaries) to processing plants an interstate one, the manu-

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<sup>5</sup> Constitution, Article I, Sec. 8.

facturing process again intrastate, the transportation of the manufactured goods to distributors an interstate one, and so on. However, it may be said that during the entire period from the time the raw material is extracted until the purchase of the good by a distributor or consumer the good, in one stage or another of completion, is in the stream of commerce. The times when a good is being processed, in a factory or elsewhere, are merely pauses in the stream while the good passes through a throat or bottleneck and changes form in some degree, but it is still subject to controls under the interstate commerce power.

Nothing in the Constitution indicates how far the commerce power can be expanded. The basic question, in this respect, hinges on whether there is a reasonable connection between the movement of goods and the regulation that is proposed. If there is, in the opinion of the judiciary, a reasonable relationship between the free movement of goods across state boundaries and the federal control under consideration, then federal control is warranted. In the final analysis, the opinion of the judges determines whether or not the relationship is sufficiently clear to justify the regulation.

Actions of Congress and the courts under the commerce clause have varied widely. Extremely strict controls of the activity of unions have been based on the interstate commerce power as have very liberal grants of freedom of action. For example, under the Sherman Anti-Trust Act of 1890,<sup>6</sup> combinations or conspiracies in restraint of trade were unlawful. This law was applied effectively to unions. Many injunctions were issued under it forbidding common union actions; in one case individual union members were held pecuniarily responsible for damages growing out of a boycott,<sup>7</sup> and in another the president of the American Federation of Labor narrowly missed serving a jail sentence.<sup>8</sup> Although harmful effects on commerce were incidental effects of the struggle of a union to improve its bargaining position, the resultant controls were as strict as if the interference had been intentional. Even after organized labor had succeeded in getting modifications, via the Clayton Act of 1914, in the wording of the anti-trust laws, there were sweeping injunctions against labor and other restrictive controls issued on the basis of prohibiting an interference with interstate commerce.

While this "free translation" of the commerce power prevailed, Congress attempted to control child labor by the commerce power. In this attempt at control<sup>9</sup> Congress prohibited, for thirty days after production, the shipment in interstate commerce of goods that had

<sup>6</sup> 26 Stat. 209.

<sup>7</sup> *Loewe v. Lawlor*, 208 U. S. 274 (1908).

<sup>8</sup> *Gompers v. Bucks Stove and Range Co.*, 221 U. S. 418 (1911).

<sup>9</sup> See below, Ch. XIII for a fuller discussion.

been worked on by child labor. Since there had been many instances prior to this time in which the courts had held that union action not directly in the stream of commerce was subject to control under the commerce power, it seemed that such controls would be held valid. But strangely, in this case the Supreme Court could not see a reasonable connection. Therefore the law was nullified.<sup>10</sup> For roughly fifteen years after this decision the courts continued to hold in numerous cases that union actions against an employer were a violation of the anti-trust laws in that the action interfered with interstate commerce. Yet during the same period the court would not approve, under the commerce power, regulations of employer-labor practices that related equally to interstate commerce.

Since 1930, and especially since 1935, the courts and Congress have expanded the applicability of the commerce clause. Federal laws have been enacted setting minimum wage rates and a maximum basic work week, prohibiting child labor, and guaranteeing the right of workers to belong to a union. These laws have been reviewed by the Court in test cases and found within the powers of Congress.<sup>11</sup> This shift in court attitude is somewhat perplexing to those who wish an interpretation consistent with precedent. It does, however, serve to emphasize the fact that that which is legal depends on the makeup of the judiciary and the social and political tempo as well as the provisions of a law or the Constitution. Almost any statement is capable of varied interpretation by different persons, and is likely to be interpreted differently from time to time.<sup>12</sup>

### Restrictions on congressional power

There are certain restrictions on the Congress as well as certain powers that it is granted. One of the former specifies that "Congress shall make no law . . . abridging the freedom of speech or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."<sup>13</sup> Obviously, this provision cannot be adhered to strictly; freedom of speech or press does not extend so far as to permit slanderous attacks on an-

<sup>10</sup> *Hammer v. Dagenhart*, 247 U. S. 251 (1918). See Ch. XIII.

<sup>11</sup> This must not be taken to mean that all industry is subject to federal regulation on these subjects. Administrators have drawn a somewhat vague and shifting line demarcating that which is subject to federal regulation under the commerce power and that which is not. The application of these laws will be noted in Chs. XIV and XVII, below.

<sup>12</sup> Although the extent of the influence is not capable of measurement, the economic conditions, industrial structure, general conditions of labor relations, and the like influence the flexibility of interpretation of the Constitution by the courts. Judges, like other persons, find it difficult to divorce themselves from social and economic conditions and customs and their attitudes invariably must be colored by these factors outside their legislative and judicial world.

<sup>13</sup> Amendments to the Constitution, Article I.

other person, and the point of time at which an assemblage stops being peaceable is not clear. This is not to say that the first amendment is meaningless; the people of the United States have a high degree of personal freedom, but the guarantee is still far from absolute.

The fifth amendment is one that is more likely to figure as a restriction on economic controls. That amendment, referring to the powers of Congress, provides that "no person shall . . . be deprived of life, liberty, or property, without due process of law; . . . ." A number of words in this passage are not clear as to their meaning, and consequently there is much variation in interpretation. "Liberty" and "property" are terms whose meanings give rise to many disputes. So long as property meant only physical goods, the question of when property had been taken or damaged was not difficult. But for more than half a century the Supreme Court has held that intangible rights, such as the right to do business or the expectation of profits, are also property. With this concept of property, a law setting a minimum wage to be paid by employers might be held to damage or restrict the property right to do business.<sup>14</sup>

The due process clause need not be expanded at this point. It will suffice here to note that the clause injects even more uncertainty into the fifth amendment. Even when a person is deprived of liberty or property, he still cannot legally claim a constitutional violation unless the deprivation was accomplished without due process of law. If the courts decide that the deprivation was not arbitrary and that it was done with reasonable regard for accepted legal practices and methods, constitutionally guaranteed rights have not been violated.

Such are the constitutional bases of and limits on federal labor legislation. While, as has been noted, these clauses are relatively elastic, some relationship must be found between a problem subject to federal control and one of the delegated powers. For "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."<sup>15</sup>

#### Federal administrative controls

As has previously been noted, executive action is frequently used to accomplish labor controls. A study of the use of executive power

<sup>14</sup> The development of the concept that "property" included intangible rights and expectations was slow. For a relatively early statement of that concept by a majority of the federal Supreme Court see: *Adams Express Co. v. Ohio*, 165 U. S. 194 (1897) rehearing 166 U. S. 185 (1897).

<sup>15</sup> Amendments to the Constitution, Article X.

in solving labor disputes shows that the rapid growth in the exercise of such power has come in periods of crisis—of war or severe depression. This probably is due to the fact that it is the governmental power “which is most spontaneously responsive to emergency conditions.”<sup>16</sup> Once situations occur with sufficient frequency to be anticipated and accurately predicted, they can be handled by rule rather than emergency action of the executive.

The portion of the Constitution that deals with the President, his selection, and powers is very loosely drawn. It opens with the statement that “The executive Power shall be vested in a President of the United States of America.”<sup>17</sup> A number of powers or duties are conferred on him: to act as commander in chief of the armed forces, to make treaties (with the advice and consent of the Senate), to grant pardons, to recommend to Congress measures he deems expedient, and others. In addition, “he shall take Care that the Laws be faithfully executed.” Even with these statements of power and responsibility, there is no specific indication of what powers the President may exercise, especially in the field of economic control. Whether or not the opening statement of Article II that the executive power is vested in the President was meant as a grant of blanket authority, the history of the presidency has been one of expanding powers, especially in the area of economic control.

One further power of the President should be noted, a duty which arises indirectly out of his position as commander in chief. The Constitution provides that “The United States shall guarantee to every State . . . a Republican Form of Government and shall protect . . . on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence.”<sup>18</sup> Under this clause, troops may be ordered into an area at the time of a severe disturbance, such as a bitter labor dispute. In the latter part of the nineteenth century, this step was taken frequently, and, in some cases, before the troops had been requested as specified above.<sup>19</sup> An extreme instance of such action was when President Cleveland sent troops into Chicago at the time of the Pullman Strike of 1894 despite protests of the Governor of Illinois that the troops were not wanted. Although this power has not been utilized against unions in many years, the responsibility of protecting against domestic violence is as vague as ever. Probably the greater degree of organization of labor at the present might cause a

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<sup>16</sup> Corwin, E. S., *The President: Office and Powers*, p. 1. New York: New York University Press, 1940.

<sup>17</sup> Constitution, Article II, Sec. 1.

<sup>18</sup> Constitution, Article IV, Sec. 4.

<sup>19</sup> Corwin, E. S., *op. cit.*, p. 170.

President so inclined to hesitate prior to sending troops, but the power is still available.

### Judicial controls

A third general source of government control has been noted: the control emanating from the courts. According to the Constitution, "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may . . . establish. . . . The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States. . . ." <sup>20</sup> The extension of judicial power to all cases in law and equity gives an extremely wide area of action to the courts. Not only are cases at law, that is, interpretations of the meaning and applicability of legislative enactments, covered, but also cases of lawful rights and duties that arise out of social and economic relationships not governed by written law. Cases at equity are cases that seek to give equal justice between contending parties, or "natural justice." Equity jurisdiction exists where courts of law recognize no right and therefore no remedy, but where a court of equity recognizes equitable rights. <sup>21</sup>

In the field of labor economics equity jurisdiction is especially important as the source of injunctions in labor disputes. In many instances, equity courts have decided that appropriate equitable relief in a dispute between employees and employers consists of restraining either the commission or the continuance of some act—usually an act of a union group that has proven or threatens to prove difficult for the employer to circumvent. There is need for courts deciding cases in equity when legally stated rights are not available to serve as a basis for resolving some dispute. However, the vagueness of the guiding principles has made it possible to use cases in equity effectively against organized labor. The general attitude of most members of the judiciary has been such that equity courts have done much to limit effective union action and relatively little to restrict employer labor policies.

### State labor controls

Despite the fact that the general trend for many years has been toward an expansion of the regulatory action of the federal government, there remains much regulation in the field of labor relations that springs from the states. In many instances, state controls are

<sup>20</sup> Constitution, Article III, Secs. 1 and 2.

<sup>21</sup> Bouvier, John, *Law Dictionary and Concise Encyclopedia*, Third revision (eighth edition), Vol. 1, pp. 1057-1065. St. Paul: West Publishing Co., 1914.

necessary and proper. Let us note the basis of state controls and the limits thereon.

State labor controls spring from a power that is not mentioned in the Constitution. The states are assumed to have police power, a power not attributed to the federal government. The police power "is an indefinite authorization for the American state to abridge liberty or property without consent or compensation."<sup>22</sup> This authority may be exercised validly, however, only if the abridgement or restraint is to result in general benefit to the public. The police power is not the power to regulate or restrain simply for the sake of restricting, but rather it is the power to abridge individual liberty in order to promote the general welfare.

It is simple enough to find examples of the police power used in day-to-day social relationships. Speed laws or quarantine laws are examples of regulations that limit the freedom of individuals, and in these instances the social benefits resulting from the restriction are clear. But in economic relationships the case is not so clear-cut, for that which is economically beneficial is highly debatable. Professor Ely's statement that the police power "must shape property and contract to existing social conditions by settling the question of how far . . . regulations may . . . impose burdens on property"<sup>23</sup> is true. But is enough social benefit to come from the enactment of a minimum-wage law to justify the restriction of the property owner's right to pay any wage that he chooses? And will the higher prices that may result from higher minimum wages cancel the benefits that would go to workers whose wages were raised? Or what is the net balance of social benefit versus individual restriction to be derived from a law prohibiting the closed shop or, on the other hand, guaranteeing the right of workers to organize and bargain collectively? In the field of economics, therefore, a determination of net social gains or losses is not simple, and the opinions of different individuals vary widely.

Despite the conflict of opinion, the development of a more and more complex economy has created a situation that necessitates, in many instances, an extensive exercise of the police power. The day of the small scale employer with a few relatively skilled and independent workmen has faded rapidly. While such employer-employee relationships have not completely vanished, they are no longer typical. Large scale business enterprises and corporate ownership have grown rapidly. Mechanization has lessened the average degree of skill possessed by the typical worker. Man-to-

<sup>22</sup> Commons, J., and Andrews, J., *op. cit.*, p. 513.

<sup>23</sup> Quoted in Commons, J., and Andrews, J., *op. cit.*, p. 516.



man relationships between workers and employers are infrequent. The growth of unions has given a new bargaining weapon to some groups in the labor force. Out of these changes in the structure of our economy many maladjustments have grown.

One of the results of these developments has been inequalities of bargaining power that in many instances make it possible for one party to set the terms of the work contract; frequently, it was the larger employer dealing with a weak union or non-organized employees. In other recent cases a strong union sometimes has been more than a match for smaller and less powerful employers. Where either party is able to set the terms of the work contract on a take-it-or-leave-it basis, the result is likely to be undesirable.

In other instances where the power of employers or employers' associations is matched by the power of a union and where one or both of the parties are inclined to fight out many issues, the public may suffer considerable hardship. Many of the bitterly contested work stoppages of the post-World War II period are proof of this fact. Probably in most cases neither contestant has any intention of inconveniencing the public, the effect on the public appearing incidental to the final solution of the dispute at issue. In such situations it does not seem to be good economic policy to let the parties fight the dispute to a finish.

A third condition has developed from the growth of modern industry that necessitates frequent exercise of the police power. This is the constantly recurring conflict between rights and interests of workers and employers. For example, it is assumed that an employer should have free access to the labor market and the right to offer wages that he feels able to pay. On the other hand, it seems equally clear that workers have the right to a decent, living wage. But for the marginal producer it may be impossible to pay a wage that will provide a decent standard of living. Or workers exercising their right to organize may build a union strong enough to demand and get a closed shop agreement. In that case the employer's free access to the labor market is restricted. Whose rights should be protected in cases of this sort? Obviously, one or both persons' rights must be controlled and directed toward socially acceptable goals; otherwise the stronger will dictate terms of the employer-employee contract with little regard for justice. Clearly, not every individual or firm can exercise its rights without coming in conflict with others who also have certain rights.

### Restrictions on state controls

Thus, problems of modern labor relations have been such that guidance or control has become more necessary and widespread.

Although the states, acting under the police power, are freer to act than the federal government, there are restrictions on state controls as well as federal. The fourteenth amendment contains the provision most commonly quoted in this connection; it is similar to the fifth amendment, which applies only to the federal government, but contains added provisions. It stipulates that

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."<sup>24</sup>

The provisions requiring due process of law in order to deprive of life, liberty, or property offer no problems not arising from the fifth amendment and therefore require no further comment.

Amendment fourteen sets up, however, a new standard for state legislation or any other state action that the executive or judiciary might undertake.<sup>25</sup> This requires that the state not deny equal protection of the laws. Question may arise as to whether special legislation for women or for workers in some certain industry would be permissible under this amendment. Although not all court rulings have so indicated, it is clear that at present such classification of certain groups for special treatment or protection is permissible. Wide discretion may be used by the states in classifying the groups to which certain legislation applies provided that the classification is reasonable and all persons within a given class or group are treated alike. Thus, the equal protection clause only requires equal treatment within reasonable groupings; protective legislation for segments of the population is permissible.

Another amendment to the Constitution has general applicability to both state and federal law, but is not of great importance for either. It is, however, worth noting. The provision is that "Neither slavery nor involuntary servitude, except as punishment for crime . . . shall exist within the United States."<sup>26</sup> The sentiment after World War II to prohibit strikes in industries affecting public interest and in public employment was considered by some as requiring involuntary servitude. While there is much in such legislation to be criticized, it did not threaten involuntary servitude. Concerted work stoppages were, it is true, prohibited by law in some legislation,<sup>27</sup> but

<sup>24</sup> Amendments to the Constitution, Article XIV, Sec. 1.

<sup>25</sup> Bouvier, John, *op. cit.*, pp. 1046-1055.

<sup>26</sup> Amendments to the Constitution, Article XIII, Sec. 1.

<sup>27</sup> See below, Chs. XXIV and XXV.

individual workmen were free to stop work as individuals if they chose. Probably, in the near future at least, there will be little if any need to measure legislation against this amendment.

Another constitutional restriction on action by the states is the requirement that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."<sup>28</sup> The philosophy expressed in this clause, along with the guarantees of liberty contained in the Fourteenth Amendment, has contributed to a court attitude tending to support a theoretical freedom to contract one's services. Many cases to be noted will show this point of view. Although this attitude has not been widely held for the past fifteen years, there is still a considerable group which holds that complete freedom of contract is desirable. Those who hold this view minimize the importance of economic necessity as a factor that forces many to agree to work for wages or under conditions that are not satisfactory. Freedom of contract, without protective legislation, is much more a hypothesis than a reality.

States and the federal government both are forbidden to pass an *ex post facto* law.<sup>29</sup> This prohibits legislation enacted to make a previously committed act a crime. Again, these provisions have not proven to be of significance as a basis for invalidating labor legislation. However, the protection guarantees both workers and employers that actions done within the law will not be used later as a basis of punishment.

Instances will be noted in subsequent chapters in which both the federal government and the states may have chosen to enact regulations in the same field. As an example, in 1948 many of the states had minimum-wage laws applicable to women and children in their jurisdictions and the federal Congress had enacted a minimum-wage law covering workers, in most industries, whose products enter interstate commerce. In such instances, the requirements of the two regulations may not be the same. The Constitution makes provision for any conflicts. It provides that

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."<sup>30</sup>

With the two types of minimum-wage laws noted, state and federal, if the federal minimum was 40 cents per hour and the state min-

<sup>28</sup> Constitution, Article I, Sec. 10.

<sup>29</sup> Constitution, Article I, Secs. 9 and 10.

<sup>30</sup> Constitution, Article VI.

imum 35 cents per hour, workers subject to both laws would have to be paid 40 cents. The state law could not be used to undermine the federal law. On the other hand, if the state law specified 50 cents as the minimum, then it could be enforced rather than the federal law. Enforcement of the state law in this case would not conflict with the federal regulation, which is paramount.<sup>31</sup>

The post-World War II period brought the greatest wave of labor trouble and strikes that the United States has ever seen. Numerous suggestions of methods of settlement were made, one of which might be noted here because of its relationship to constitutional powers and because such a plan is of considerable interest for the future. The proposal was that a system of labor courts be established by Congress. Such a plan is within the power of Congress if it wishes to establish labor tribunals: judicial power is vested in one Supreme Court "and in such inferior Courts as the Congress may from time to time ordain and establish."<sup>32</sup> Elsewhere in the Constitution, Congress is given the power "to constitute Tribunals inferior to the supreme Court."<sup>33</sup> The fact that the power exists, however, does not make the creation of a functioning system simple. Such a system of courts would be useless without a set of regulations upon which to base judgments. Determination of the area of jurisdiction and the rights of parties to controversies would be a necessary prerequisite of such a program. It is entirely possible, despite the problems involved, that the subject of labor courts may rise again for serious consideration.

Such are the bases on which federal and state governments have established an ever-increasing number of controls and may in the future enact more. While the Tenth Amendment reserves to the states powers not delegated Congress, extension of the commerce power has changed the situation. In one very broad sense, therefore, one might view the federal government not as lacking in police power, but as having relinquished it. Since World War I the federal government has shown an inclination to retrieve some of this police power while, in theory, leaving the authority untouched in the hands of the states. The Congress has, with the consent of the courts, in recent years broadened the concept of interstate commerce and the authority existing thereunder to enact much legislation that, if it were permissible at all, would have been allowed a few years earlier only to the states. Thus, in a rather broad sense, police power now

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<sup>31</sup> The federal Congress may, however, grant to the states precedence for their laws over those of the federal body. As will be seen in Ch. XXV, this has been done in the Taft-Hartley Law.

<sup>32</sup> Constitution, Article III, Sec. 1.

<sup>33</sup> Constitution, Article I, Sec. 8.

is exercised by both federal and state governments in that both legislate for the enhancement of the general welfare.<sup>34</sup> There remains, however, a technical distinction of appropriate powers that is adhered to, at least in theory.

Although some Supreme Court rulings have officially rested on the point that the federal government was exceeding powers delegated to it, the facts seem to be that general approval of legislation regulating labor relations and seeking to solve labor problems came only with a gradual change in attitude of the judiciary toward property rights and the rights of labor. This change has come, on a broad front, only in the past score of years. Prior to that time, there were some decisions and some justices pointing the direction of the coming shift. For example, the federal Supreme Court has been on record for a half-century "that the law is, to a certain extent, a progressive science; that . . . some . . . methods of procedure . . . deemed essential to the protection and safety of the people . . . have been found to be no longer necessary; that restrictions . . . formerly . . . laid . . . have proved detrimental . . . while . . . certain other classes of persons . . . have been found to be in need of additional protection." Therefore, the law will "be forced to adapt itself to new conditions of society, and particularly to the new relations between employers and employees."<sup>35</sup> But the justices who wrote or concurred in the viewpoint stated above were a quarter-century ahead of their time; there are many instances in more recent rulings where it would have been desirable for the stated philosophy to have guided the thinking of the justices.<sup>36</sup>

### Questions

1. To what extent are "property rights" separable from "human rights"? To what extent are "property rights" only the rights of some individual?
2. If the federal government has the power to keep open the channels of interstate commerce, how far beyond the actual movement of goods may it logically extend its regulations?
3. To what extent does the definition of property as including rights and expectations expand the power of the judiciary? How?

<sup>34</sup> Commons, J. and Andrews, J., *op. cit.*, p. 517.

<sup>35</sup> *Holden v. Hardy*, 169 U. S. 366 (1898).

<sup>36</sup> For example, the Supreme Court in 1917 approved the use of the yellow-dog contract as a means of effectuating an anti-union policy; *Hitchman Coal and Coke Co. v. Mitchell*, 245 U. S. 229 (1917). A few years later, it found itself unable, under its interpretation of the Constitution, to approve federal regulation of child labor; *Hammer v. Dagenhart*, 247 U. S. 251 (1918). Still later, it held minimum-wage laws for women to be a violation of that document; *Adkins v. Children's Hospital*, 261 U. S. 525 (1923). Many other decisions of a similar philosophy were rendered year after year.

4. Why has the number of federal executive orders increased so rapidly? Is this increase logical? Is it desirable?
5. Give examples of exercise of the police power of the state that are common today. How far can the police power be expanded?
6. The fifth and fourteenth amendments make certain rights highly protected but not inalienable. Explain.

## CHAPTER V

### FACTORS AFFECTING THE EXTENT AND TYPE OF GOVERNMENT CONTROLS OVER LABOR

#### Factors encouraging the extension of controls

The foregoing chapters have indicated that there is in our economy a great amount of legislative, executive, and judicial control over the solution of labor problems. The establishment of these controls was an erratic development; at some times there was rapid enactment, on other occasions removal was the order of the day or enforcement lagged, and at still other times some particular type of control was used while others, temporarily at least, receded in importance.<sup>1</sup> It is desirable at this point to examine the factors that influence the amount and type of guidance which the government tries to exert on the labor-employer relationship.

The economic and social conditions existing at any one time will have a marked effect on the advancement or retardation of labor controls. As a general proposition, economic prosperity discourages the enactment of controls or encourages the removal of measures previously enacted. In prosperous times, relatively full employment and high profit levels cause business leaders and the general public to feel that all is well and business enterprise will work better without interference. Those who believe otherwise are, at best, out of step with current opinion and are considered by many as subversive or un-American in their attitudes. Although the correlation is not perfect, an examination of the economic history of the nation shows clearly that prosperity tends to dampen the willingness to enact economic controls.<sup>2</sup>

On the other hand, periods of economic stress bring willingness to experiment with government guidance. If the economy is suffering from unemployment, low profits, failure of many businesses, low farm income, and large relief rolls, the general attitude will be that there is relatively little to lose by experiments in governmental

<sup>1</sup> For example, war and other emergency periods have been characterized by a disproportionate increase of executive controls. Again, after 1930, legislative controls over knotty problems of labor relations gradually replaced the injunctive controls of the courts.

<sup>2</sup> There are exceptions, such as the enactment in 1947 of the Taft-Hartley Act. Prosperity that threatens a dangerous degree of inflation may bring willingness to accept controls of economic activity.

guidance whereas the potential gain is great. Depression periods, therefore, have brought many new economic controls by the government. By far the clearest example of this fact is the great depression of the 1930's, when the federal government in particular extended economic controls widely, not with the sanction of all the people, it is true, but certainly with that of the majority. For many, probably most, the backing came, despite a basic philosophy opposing extended controls, from the desperate feeling that individual efforts could not revive effectively the economy of the nation. Some new method had to be tried if we were to have more nearly full employment, extended markets for goods, and a revival of business activity.

By far the greatest development of economic controls has come during the emergencies of war periods. As it happened, the Civil War and the two World Wars were fought when strong persons were at the helm of the nation. Whether under weaker Presidents the situation would have been materially different is impossible to determine. Probably less decisive persons would have relied less on executive action to accomplish the desired end; but the strain of war puts a premium on effective organization and direction of the economy to aid in the war effort. Government guidance is almost inescapable under such circumstances.

There is another reason why war brings so many more governmental controls—labor controls, in our particular case—over economic activity. In a period of war we have the greatest degree of national unity of purpose that is ever experienced. As has been stated, depression brings greater acceptance by the public of economic controls than is present during prosperity. Even so, the same enthusiasm and unanimity of aim to overcome peacetime difficulties cannot be gained—at least it never has to date—as can be aroused in time of war. Thus, a coupling of a genuine and clearly demonstrable need of government guidance with greater public acceptance of control than at other times has meant that periods of war have brought rapid increases in economic control by the government. It should be noted that although many wartime controls are removed after hostilities, and the public usually insists on this during the first flush of postwar prosperity, the results of such controls are likely to be enduring. For example, the basic eight-hour day for railroaders, granted in 1916, still stands, and maintenance-of-membership clauses, developed by the War Labor Board during World War II, were continued in numerous agreements after the war; in addition, both World Wars left a greatly expanded labor movement, higher wages, and sharpened conflicts between employers and unions.



### Social and economic attitudes of legislators

While economic and social well-being or their absence strongly influence the amount of government guidance or control which the public will sanction, there are other very important factors that should be noted. Some of these conditions tend to retard, others to encourage, controls. One condition that influences government action, or inaction, is the social and economic attitudes of the legislators. The amount and type of government regulatory action is conditioned by the social and economic background of the lawmakers, which, in turn, makes them sympathetic toward one idea or point of view and unfriendly toward another. Similarly, the amount and content of the education, formal or informal, that such persons have had will affect their attitude toward government regulations.

The "representatives of the people" who make the laws under which Americans must live and work are generally conservative in their economic attitudes. There are, to be sure, exceptions, but it is an unusual situation when a majority of Congress or of a state legislature is strongly in favor of progressive legislation extending social controls and imposing responsibilities on business. This traditional conservatism probably springs, in good part, from the economic environment in which the average legislator was born and reared and in which he lives. Most legislators are relatively well-to-do persons who live on the "right side of the tracks" and build their social and economic contacts with the propertied and well-off. In addition, few unionists can afford the time and money that must be expended to become a legislator; nor are their names well-known to the public. Consequently, propertyless legislators and lawmakers carrying paid-up union cards are rare. This is not meant to imply that being poor or carrying a union card automatically would make a person a better public servant; in fact, it probably would be more difficult to find persons capable for public office in such groups. But it is rare that a person can understand clearly the interests and problems of those of whom he has little first hand knowledge; therefore, the interests and desires of labor are not often championed by a majority of legislators.

Also, in many cases, legislators have a direct and personal interest in economic control measures that they consider. If a man is himself a property owner or employer or has friends and acquaintances who are, he is likely to subjugate the public interest when considering many legislative proposals. Another factor that enhances the apparent inability equally to weigh both sides of economic questions is that to many labor is a vague and rather unreal mass. An

accurate knowledge of labor problems and conditions is lacking in many, and they often do not have the contacts through which to build up that knowledge. A relatively clear knowledge of one side of a problem, an unclear one of other sides, and a personal interest in the issues at stake are sufficient to make a conservative attitude the most logical one to expect from our lawmakers.

Another factor tends to give a conservative tinge to the law-making bodies. Generally, the division of the states for election of federal and state representatives is such as to allow, from the standpoint of total population, a disproportionate representation from rural areas. And persons from farm areas usually are not friendly toward labor, especially toward organized labor. In many instances, such representatives are not too friendly toward business, but there is more likely to be sympathy for business than for labor.

In the federal Congress, still another situation tends to aid the conservative elements. Although the South is Democratic in politics, the majority of its people are far from liberal. Traditionally, the South has been the seat of anti-union employers and poor labor-management relations. The tradition, carried into Congress by many southern congressmen, gives aid to the conservative element. Congressional voting on labor legislation in 1947 showed that loyalty to conservative ideals caused many to cross party lines and vote in favor of punitive labor legislation. It is true that an increasing amount of liberalism is developing in the South; nevertheless, up to 1947, its general philosophy and its congressional representatives frequently were a source of opposition to many liberal movements and to social legislation.<sup>3</sup>

Thus it is seen that the tendency of legislators is to be relatively conservative and unfriendly toward social and economic controls. Conditions can change this traditional attitude, however, toward either a more liberal attitude or an unusually conservative one. During the late 1930's and early 1940's, for example, the combination of a severe national emergency and a strong-willed President who drove hard and tirelessly for the measures which he wanted made the Congress unusually susceptible to more liberal actions. On the

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<sup>3</sup> It is true that the majority of all votes can be cast by low income groups and that the major motivation of most lawmakers is to be re-elected. However, despite the political power of workers, it is not always the candidate with a record favorable to labor that is elected. Among the reasons for this situation are: the difficulty in past years of obtaining adequate information on voting records and other activities of candidates; the poll tax and other devices that discourage widespread voting; the relatively small share of all eligible voters who cast their votes in an election—over a period of years an average of about 50 per cent; the influence of political machines on nominations and voting; and the failure of many voters, perhaps most, to study issues and vote carefully rather than voting a straight ticket on the basis of tradition or indifference.

other hand, the post-World War II period with its anti-Red hysteria and its keen and vicious labor-management disputes brought into Congress unusually conservative persons and probably altered the thinking of others. The result was a national Congress generally quite unfriendly to labor. Much the same situation existed in many state legislatures throughout the nation.

### Judicial attitudes

Attention has been called previously to the fact that, in the final analysis, the judiciary is the determiner of the controls that may or may not be applied. Since this is the case and since judges, like all other people, base their thinking in good part on their social and economic attitudes, it is well to consider them much as we did the lawmakers. Much of that which was said about the legislators is equally true of the judges.<sup>4</sup>

Like the congressmen, judges tend to be a conservative group; an occasional liberal who finds his way to the bench stands out as unusual and does not blend well with his surroundings. Reasons for the conservatism of judges are in part the same as for that of legislators. The generally comfortable economic situation which most members of the judiciary enjoy and the social and economic contacts with the well-to-do tend to encourage conservatism. This attitude has shown itself occasionally in such revealing comments as the statement of a New York Supreme Court judge that the courts "must stand at all times as the representatives of capital, . . . devoted to the principle of individual initiative, protect property and persons from violence and destruction, strongly opposed to all schemes of nationalization of industry, and yet save labor from oppression, and conciliatory toward the removal of the workers' just grievances."<sup>5</sup> It is somewhat doubtful if all the loyalties outlined in the statement can be kept at the same time.

Comments such as the one quoted are not typical of the thinking of all judges, and many quotations from other judges could be found that show more liberality. However, the record of the courts in various actions over more than a century suggests the conclusion that conservatism is the rule rather than the exception.

There is yet another reason for the tendency of jurists toward conservatism. In training for the legal profession, emphasis is placed on precedent, on the decisions made in the past. Thus, lawyers train for their careers by looking backward; when a case arises in-

<sup>4</sup> For an excellent statement of judicial attitudes and reasons therefor see: Mason, A. T., *Brandeis and the Modern State*, Ch. I. Washington: National Home Library Foundation, 1936.

<sup>5</sup> *Schwartz and Jaffe v. Hillman*, 115 Misc. Reports 61 (N. Y. 1921).

volving a question of the establishment of a minimum wage, for example, past decisions on similar cases are familiar. But were the social and economic conditions that prevailed at the time of the precedent case similar to the current situation? Even if conditions were comparable, was the original decision one that took into consideration adequately all factors that should have been considered? To answer these questions is difficult, yet if cases are to be judged on precedent, accurate affirmative answers are imperative.

The practice of arguing cases and judging on the basis of precedent is undesirable from another standpoint. It tends to emphasize the technical knowledge of past events and opinions. It seeks to determine issues that are of current and future importance on the basis of past events. To the extent that such methods and knowledge aid in making more just and realistic decisions they are defensible, but no further. The danger of such practice is that the legal mind becomes the master of logic and technique and little more. From dependence on such reasoning have come opinions such as ". . . the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee. . . . In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract . . . ."<sup>6</sup>

Later the Supreme Court commented with equal economic naïveté on "freedom of contract included within the guaranties of the due process clause of the Fifth Amendment." The Court stated that "the right to contract about one's affairs . . . is settled by the decision of this court. . . . Within this liberty are contracts of employment of labor. In making such contracts . . . the parties have an equal right to obtain from each other the best terms they can . . . ."<sup>7</sup>

Theoretically, such decisions are adequate and defensible; from a realistic point of view, in which the power of workers and employers to exercise their rights is taken into consideration, the "equality" does not exist in many cases. Especially at the time that these decisions were rendered, when the trade union movement was very weak, the power of the employer to hire, or to refuse to hire, and to discharge was much greater and more coercive than the power of the worker who refused to work. The job control of the employer caused many persons to scrap their right to demand higher wages or the right to belong to a union in order to continue, along with their families, to eat. To many logicians or theorists the failure

<sup>6</sup> *Adair v. United States*, 208 U. S. 161 (1908).

<sup>7</sup> *Adkins v. Children's Hospital*, 261 U. S. 525 (1923).

to exercise some right is not so significant as the existence of the hypothetical equality. But to the student of labor economics, thinking in terms of the relative waiting power of employers and unorganized employees, true equality frequently does not exist.

Thus the judiciary has tended to bulwark the existing economy and protect it from rapid change. It seems clear that the tone of the decisions rendered comes more from conservatism than from precedent. The many dissents, especially in recent years, emphasize the extent to which personal predilections can lead to varying opinions. Often, in one case where the same problem, the same evidence, and the same conditions and precedents are considered and weighed against the same Constitution, two or more opinions, sometimes diametrically opposed, are reached by different judges. Precedents can be found to bolster almost any opinion; personal opinion leads to the decision that one precedent is binding and another is not, that circumstances are not comparable, and so forth, all of which, in turn, lead to differing judicial rulings on issues that come before the courts.

Whatever the reason for the general conservatism of the judges, their decisions influence strongly the extent and type of government controls. This influence is exercised directly through the approval or disapproval of legislation coming before the courts. As examples of the retarding influence of the courts, minimum-wage legislation for women was delayed for fifteen years by adverse rulings of the Supreme Court; federal regulation of child labor was held up twenty years by opinions of the same body; and attempts to guarantee the right of workers to join unions if they so desired were delayed for an even longer period.

Indirectly, the Court has a further effect on the economic controls of the nation. Legislators realize that any controversial legislation which they enact must pass the scrutiny of the Supreme Court. Thus, adverse rulings on some law may discourage enactment of a control until a way is found which it is hoped will justify the new legislation in the eyes of the Court.

In still another way, opinions of the Supreme Court have an indirect influence on government action. High Court decisions influence the decisions of lower courts, and, thus, many cases that never come before the higher echelons of the judiciary are remotely controlled.

All that has been said above is not to be construed as criticism for which there is no answer. The courts of the land were provided as a check on the other branches of the government. A stabilizing influence in a government probably is highly desirable. There is a difference, however, between acting as a stabilizing influence, protect-

ing against rapid and ill-advised change, and acting as a bulwark against social progress. As stated in *Holden v. Hardy*<sup>8</sup> a half-century ago, the law must be a progressive science. It is clear that in many instances since that landmark decision the wisdom of its advice has been forgotten.

Despite the dark picture of the influence of the courts on progressive labor legislation, there have been encouraging developments that indicate to the social scientist an improved and more realistic legal profession and judiciary. Perhaps no man did so much to bring the subject of economics into the law as did the late Associate Justice of the Supreme Court, Louis D. Brandeis. Justice Brandeis saw clearly the influence of personal predilections on the formulation of judicial opinions and spent much of his lifetime as a lawyer and a jurist trying to promote reliance on statistical data as a basis of decisions rendered by the courts. Not only did he achieve some success in this endeavor, but his approach to the law has had some effect on training for that profession.

In Justice Brandeis' opinion, law was "essentially an instrument of social policy. Adequate grasp of it does not proceed out of mastery of the rules of logic."<sup>9</sup> With this belief dominant in his thinking, he became essentially a crusader for an interpretation of the law that was in keeping with his philosophy. His was not the attitude of Justice Holmes, who held that provisions of the Constitution should not be used "beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires."<sup>10</sup> Justice Brandeis did not wish to stand so aloof; according to his thinking, social needs, relative economic power, business practices, and a multitude of statistical data should be weighed and used in making decisions.

Persons interested in social science may well applaud, as many have, the unprecedented approach Justice Brandeis took toward the law. However, many justices considering the same questions with the same data available for examination arrived at quite different conclusions. But if one sanctions the practice of elevating personal evaluation in making judicial opinions, the possibility that many may not agree with a particular set of values is a chance that must be taken. Whether the practice is sanctioned or not, decisions are based in large part on personal evaluations so that no new threat is embodied.

Justice Brandeis' death did not bring to a close his influence on the law and the judiciary. Opinions of the past decade have shown

<sup>8</sup> 169 U. S. 366 (1898).

<sup>9</sup> Mason, A. T., *op. cit.*, p. 230.

<sup>10</sup> Dissent in *Truax v. Corrigan*, 257 U. S. 312 (1921).

many instances in which the Brandeis dissent of a score of years before became the opinion of the majority. Undoubtedly the persons named to the bench by President Roosevelt were a selected group that would look favorably on "New Deal" legislation, but the socio-economic approach to legal questions nevertheless has had its influence. It is doubtful if so many liberal justices could have been found for appointment when Justice Brandeis was beginning to make his name.

Another development should be noted; there is a gradual decline in the relative emphasis placed on precedent in training for the law. The amount of pre-law training in economics and other social sciences and business courses is on the increase. To the extent that the trend is continued, a more realistic legal profession can gradually evolve. Probably a wider knowledge in these fields will bring, or has already brought, a more liberal group into the profession. Even though more liberal attitudes may be desirable, that should not be the primary aim of changes in legal training. Greater realism should be the first goal; if a liberal attitude also is forthcoming, well and good! If not, a realistic approach is still needed.

To recapitulate briefly the influence on labor controls and economic guidance exercised by the judiciary, it must be recognized that the courts, through their approval or disapproval of legislation and through their sanction or denial of the use of injunctions, have proved to be an unusually important factor. Generally, with a few noteworthy exceptions from time to time, their influence has been conservative, in some cases indisputably anti-labor. The trend, personified by Justice Brandeis, of supplementing the law with social and economic considerations has grown and is indeed an encouraging one. This is now showing itself in an appreciably liberalized judiciary and in a changing type of training for persons who hope to enter the legal profession. Prospects are for a more realistic attitude, and probably a more liberal attitude toward social and economic problems. However, trends are sometimes reversed; there is no certainty that a shift will not occur again. Probably the best insurance of a continuation of present trends lies in the spread of the broader training for the law that was noted above.

#### Attempts to influence attitudes

The general attitudes of the members of the legislative and judicial branches of the government have not been in the past, nor are they today, left to develop as they may. They are the focal point of continuous effort by many and various interested groups seeking to mold opinion so that policies of government will conform to their desires. Action of these groups is taken through lobbying activities

in national and state capitals and in seeking to elect friendly and defeat unfriendly persons at election times. Similar, but slightly different, are attempts to secure the appointment of friends to administrative and judicial positions and the defeat of those considered unfriendly. In almost all cases, the demands or urgings of groups representing labor will conflict sharply with those of groups representing business and farm groups, although one farm organization is frequently aligned with labor on the national scene and the same is true occasionally in the states.

Trade associations, chambers of commerce, and other business groups generally devote their lobbying and political efforts to encouraging conservative attitudes in Congress and state legislatures. Property and property rights are significant and, in their opinion, need legislative and judicial protection. Their philosophy of economics centers largely in the faith in a competitive economy and the belief that business competition will police our economy effectively. Monopoly is decried in theory, although not in practice, and unions that become strong are looked upon as monopolies that are not in keeping with American economic traditions.<sup>11</sup> Individual initiative is held to be the key to economic progress, and government actions are very frequently criticized as destructive of this initiative in businessmen and in workers.

With this philosophy, business organizations have usually opposed pro-labor legislation. At the time of their passage, workmen's compensation laws, unemployment compensation laws, child labor and minimum-wage controls, and social security legislation were opposed by some business groups. Since World War II, state and national restrictive labor legislation has been urged and, except in a handful of states, fair employment practices legislation has been successfully opposed. Except at certain periods of time, at both national and state levels pressure groups representing business have enjoyed a more friendly reception than those representing labor.<sup>12</sup>

Reasons for this attitude are not hard to find; in good part they spring from the basic philosophy of our economy. It has been held in the past, and many still hold, that allowing each person or group to pursue its own best interest will work out for the best in-

<sup>11</sup> Essentially, economic action of unions is based on a attempt to secure monopoly control over the supply of labor. But the unequal bargaining power of labor and employers in modern industry is such that some such control is necessary to bring equality of bargaining power that is basic to the effective working of the theory of competition. Even with bargaining power equalized through organization, the similarly basic assumption of numerous competitors will not be met; however, this does not make organization less desirable under the existing conditions.

<sup>12</sup> The most outstanding exception to this statement is the period between 1935 and 1942 when, at the national level in particular, labor representatives enjoyed more prestige than ever before.



terests of society. Even though most social scientists no longer accept this opinion, it is far from dead. A second reason for the attitude is the inability of most persons or groups to approach problems with a perspective broader than their own personal interest. Worse, perhaps, is the tendency of many to assume that their interests and desires are the same as those of the general public; in their thinking, that which benefits themselves benefits all. Probably businessmen are no more guilty of this practice than are others in our society. A final factor is that some persons in any walk of life will pursue their own interests even though recognizing that such action may be harmful to society. So, partially for selfish reasons and partially from lack of perspective, business groups steadily press their attempts to control or influence government labor controls. Historically, their attempts have met with much success; of recent years, successes have been less frequent.

With a traditionally large portion of our population coming from rural areas and changes in our basis of representation in response to population shifts being relatively slow, representatives from and pressure groups urging the interests of farm groups have always wielded much influence. In the eyes of those who favor government action to protect labor or extend certain rights to it, this situation has been a serious impediment. Farm groups are an individualistic and conservative lot in their economic thinking, and they tend to ally themselves in their sympathies with the business interests. Consequently, those representing labor have found it necessary to meet the combined opposition of business and farm groups. Although the National Farmers Union and, on occasion, other farm groups, such as the Farm Bureau, have been friendly toward the aims of labor, the general influence of the rural area representatives on the amount and type of labor legislation has been unfriendly. The farm lobbies, like those of business, have usually enjoyed considerable success.

### Political action of organized labor

Some groups in the labor movement only recently have accepted the idea that workers should use political as well as economic action in trying to reach their goals of a greater share of national production and a greater degree of security. The long-standing reluctance to undertake political action sprang largely from Samuel Compers and the American Federation of Labor, which was until 1935 the dominant labor organization in the nation. The Federation, following the philosophy that it was essential for the labor movement to keep as free as possible of entanglements with government, originally favored attempts at improvement of wages and hours, except

for special groups, only by collective bargaining, and opposed social legislation, such as sickness insurance and old age pensions. In other words, the Federation wanted to use only economic action; political action, even when directed toward desirable goals, was mistrusted and disapproved. This policy was followed generally until well after World War I. The events of the 1930's dealt a knockout blow to an already weakened policy.

This policy seems unwise, for a union that does not utilize political action is failing to use one of its potentially effective tools, and is likely to be using its economic action at a disadvantage. Until the time comes when workers are all organized, there will be many who will not benefit directly from organized economic action. Even after the great increase in union membership between 1938-1948, unionists represented only about one-fourth of those who were gainfully employed. For many years to come, action by unions to affect wages, hours, or other conditions of their members will fall far short of benefiting all workers. For still another reason, failure to use political action is unwise. The political climate, that is, the laws, administrative procedures, and judicial atmosphere, in which unions operate influences the success or failure of their action. For example, the National Labor Relations Act, with its guarantee of the right of workers to join a union, changed radically the effectiveness of attempts to organize unorganized plants. The Norris-La-Guardia Act greatly decreased the impeding effect of injunctions issued in labor disputes.

In essence, therefore, economic and political programs of organized labor are merely two approaches toward the same goal. The political program is less direct in the sense that its benefits are broader than the labor movement. Political programs are longer-run activities than are economic actions; it usually takes more time to push through legislation than to bargain out a new agreement. When it is necessary to elect certain representatives in order to obtain desired legislation, the process is further lengthened. And finally many laws may only clear the way for effective economic action rather than accomplish the needed improvement; such action is roundabout, it is true, but it is essential as a supplement to collective bargaining.

Although the Federation avoided sanctioning government aid, it did not hold itself so aloof on the question of restrictive legislation that was harmful to labor. Thus, while spurning general protective labor legislation the Federation carried on a campaign for revision of the Sherman Act. Seeing the threat of restrictive enactments, the Federation adopted a policy of trying at the polls to reward its friends and defeat its enemies. This meant that the A. F. of L.

was active politically at election time and when it was felt that there was a need for some legislative change. So, in practice, the Federation did not stay so clear of political action as their principles suggested. But because they refused, until 1947, to admit a need for continuous political action, they have failed to establish an organization to plan and direct such efforts. The result has been sporadic and poorly planned action that has not been well-financed or given a continuing organization to make plans and programs year in and year out. Consequently, organized labor has not been the political power that it might have been; net results have not been impressive.

As was stated above, the Federation has recently changed its political philosophy considerably. It participates to a greater extent in elections and in lobbying activities; it now accepts the idea of government action to aid in combating insecurities such as unemployment or dependent old age. However, it did not yield until 1947 to the need for a continuing political organization; prior to that date its action was sporadic, growing as elections or emergencies arose and slowing down between times. Thus it has paid homage to the old philosophy of staying clear of political entanglements, while drifting away from that philosophy even before 1947.

The Congress of Industrial Organizations has taken an entirely different attitude toward political action by organized labor. This body was formed by a group of dynamic and insurgent union leaders who were impatient with the slow and easy methods of the American Federation of Labor. After the first temporary committee was established, it gradually drew to itself a large number of impetuous, hard-driving men who wanted more action in the labor movement than the Federation was willing to give. These leaders of the new organization were opportunists who would take advantage of any fair means of furthering the union movement. As a consequence, almost from the beginning, the C.I.O. followed the practice of engaging in political as well as economic activity. To put this philosophy into practice the young organization early in its history established Labor's Non-Partisan League. The League, in good part the creation of John L. Lewis, President of the United Mine Workers of America and leader of the C.I.O. in its first years, was far from non-partisan. It was dedicated to the idea of getting from organized labor partisan political action that would keep Franklin D. Roosevelt and his sympathizers in office and support the drive for progressive political reforms. Since the League was allied with Mr. Lewis, who withdrew his support from the President and severed his relationship with the C.I.O. as a result of the presidential election of 1940, its effectiveness was short-lived. If the C.I.O., without Mr. Lewis, was to promote its theory of the desirability of

political action, new steps had to be taken. These were taken in 1943 in the formation of the Political Action Committee.

The P.A.C. was born at a special meeting of the Executive Committee of the C.I.O. on July 7, 1943. Sidney Hillman was named chairman of the new organization, a post which he held until his death.<sup>13</sup> The purpose of the new organization, as reported by Philip Murray to the sixth annual convention of the C.I.O., was to plan and direct a program of unified political action for organized labor, but without forming a third party. The philosophy was still one of rewarding friends and punishing enemies at the polls within the two-party system, but it was to be an integral and continuing part of the action of the C.I.O.

According to Mr. Murray, the primary political tasks were: (1) to begin organizing the C.I.O. for local and state-wide political action in the fall of 1943 and in the critical national campaign the following year; (2) to develop unity of political action with other elements of organized labor such as the A. F. of L. and the Railroad Brotherhoods; (3) to develop unity of political action with non-labor groups, such as agricultural and consumer organizations; and (4) to begin the formation of a national political organization of labor.<sup>14</sup> In addition, there was a declaration of intent to support the Commander in Chief in promoting the war, a statement that was virtually a necessity at the time in a meeting of any group, regardless of whether or not there was any relationship between the organization and the war effort.

At the close of Mr. Murray's report of the establishment of the new committee, a resolution was introduced and passed approving its formation. The P.A.C. was officially on its way at the close of the convention, on November 5, 1943. To accomplish the broad objectives outlined by Mr. Murray, the new committee was faced with the job of quickly pulling together an organization to direct labor in a much more active role in the 1944 election and at the same time to begin to lay the basis of a continuing political organization. This was not to be an election year activity only, but a permanent program that would carve a more important niche for organized labor in the political field.

To accomplish their purpose, Mr. Hillman and his aides began to organize even before the approval of the committee was given by the convention in November. Conferences were called of labor leaders from coast to coast to explore their thoughts on the need for a special organization for political action. At these meetings, as at the

<sup>13</sup> For a survey of the formation and early years of the C.I.O.-P.A.C. see: Gaer, Joseph, *The First Round*. New York: Duell, Sloan and Pearce, 1944.

<sup>14</sup> *Ibid.*, p. 62.

November convention, there was generally strong approval of the proposal. So the late months of 1943 and early 1944 saw the rapid formation of national, regional, and state offices to carry out the new program. The exact organization is not a subject for examination in this study; suffice it to say that the committee sought to establish a powerful organization that would make use of press, radio, speakers, graphic presentation, and every other available means of promoting political action by labor and encouraging the supporting action of any other group in our society that could be interested in the new activity.

The success of the P.A.C. is not easy to assess. It soon aroused sympathetic action and organizations among liberal elements in the general population and among professional groups, such as the National Citizens Political Action Committee and the Independent Committee of the Arts, Sciences and the Professions. However, the latter was unable to agree internally in many instances, the question of ability to work with left-wing elements being especially difficult. Despite the inability to agree, public knowledge of the growth of a unified political grouping of organized labor with liberal groups caused fear among conservative elements. As a result, there were many instances in which the opposition of the P.A.C. was apparently beneficial to some candidate or political issue. Some politicians made capital of the opposition of the P.A.C. in campaigns and in urging some particular political action.

Certainly the new committee never succeeded at the national level in getting the desired degree of cooperation between various groups in the organized labor movement. Cooperation at lower levels, as in the local areas, was in many instances relatively satisfactory. It was not, however, until the threatened passage of the Taft-Hartley labor bill, in the spring of 1947, that there was any productive effort toward national political unity. As a result of the fear engendered by the most restrictive union control bill in more than a score of years, the top commands of the American Federation of Labor and the Congress of Industrial Organizations were able to meet and talk over their common interests and to agree on a measure of unity of effort, although to no avail. But the split of the two organizations at the national level was so sharp that even the enactment of the law brought no substantial unification of action.

The P.A.C. has attempted to influence the policies of government by getting the greatest possible number of all workers to vote for candidates who are thought to be friendly to their interests. This has meant concerted effort to encourage voters to register and vote intelligently. Such a program has not been an easy one; the average voter, whether a worker or not, is inclined to be lethargic and

to participate in elections only when he is dissatisfied. A second difficulty in such a campaign is the gathering and distributing of information concerning candidates and issues. Especially among workers, the general level of education and the understanding of political matters is low; there is the relatively widespread feeling that all politicians are alike, that the outcome of elections will make little difference, and that one will do just as well, if he votes at all, to vote a straight and traditional party ticket. Clearly, this is not the case; the strivings of the P.A.C. to dispel this attitude are highly commendable. Although these efforts have not met with the highest degree of success, it is clear that there is greater political awareness and activity among members of C.I.O. unions than a decade or more ago. This result is a step toward a greater degree of democracy in government; the more widespread the political activity—if it is honest and informed activity—the more representative our government.

At the same time that a continuous organization was established for the development and direction of programs to ensure that unionists were active politically, the C.I.O.-P.A.C. embarked on a program of trying, at national and state levels, to influence controls over economic, social, and labor problems. The breadth of the subjects in which interest is shown and of the legislative programs that are proposed give evidence of a range of interests much broader than labor. For example, the legislative program proposed by the P.A.C. for the national Congress in 1946 included the following: effective control over living costs; an adequate housing program; enactment of a national health bill (Wagner-Murray-Dingell Bill); no discrimination because of race, creed, or color in education, employment, or elsewhere; raising the national minimum wage to at least 65 cents per hour; a federal anti-lynching law; a permanent fair employment practices law; abolition of the poll tax; and "the protection of the farmer's interests; the protection of the small business men; a truly democratic tax system; and . . . a foreign policy that would lead us to a lasting peace."<sup>15</sup>

It may be argued that such a program is much broader than the interests of labor. In one sense this is true. However, persons who work are not only a part of "labor," they are also a part of the nation's citizenry. Therefore, whatever affects the people of the nation affects labor, and labor is logically interested. This was the point of C.I.O.-P.A.C. The principles summarized above were presented as the "People's Program for 1946," not as labor's program. This is a valid point of view; there are widespread conflicts in the

<sup>15</sup> Kroll, Jack, "Why Labor Is in Politics." *New York Times Magazine*, October 27, 1946, p. 15.

American economy, at best, without trying to mold the political efforts of labor along a line that emphasizes conflict. Despite all efforts to the contrary, much of labor's economic action heightens conflict. Political action that tends to draw labor into a closer relationship with other groups in our society may help to deemphasize the conflict.

To recapitulate, government controls over economic problems are a product of: (1) the problems that have developed and seem unlikely to be adequately settled by the interested parties; (2) the social and economic opinions and knowledge or lack of it on the part of those who enact, administer, and judge our legislation; and (3) the pressures exerted on these persons. From the birth of the American Federation of Labor, until the time of the formation of the Committee for Industrial Organization, later the Congress of Industrial Organizations, the major groups of organized labor officially disavowed political action. Despite this disavowal, the Federation did engage in attempts to influence elections and the legislative restrictions placed on labor. But owing to the unwillingness to accept the fact that political action was a reasonable type of function for organized labor, the efforts of the Federation were sporadic rather than continuous and were often inadequately planned and effectuated.

Historically there was some reason for the point of view of the Federation; earlier unions, including its immediate predecessor, the Knights of Labor, that had leaned heavily on a political program had, without exception, failed. Although there was no proof that the political action had caused the failure, it probably would have been wiser for relatively weak and insecure unions to leave political and social reforms until they had established themselves through economic action that brought a sizable and contented membership. Even though this was true in the days of youthful unions, the late 1930's and the 1940's were a different period. Although there was room for much growth, many unions were in the position of having long before proven themselves economically and had pretty well solved the problem of their existence. For these unions, at this time, a political program was an important and necessary development. Since the success of bargaining by unions for benefits for their members rests heavily on the government regulations that set labor standards and control bargaining rights and responsibilities, established unions needed to throw their weight for those reforms and controls that would aid them in reaching their desired goals.

Political action was needed for yet another reason; the general sympathies of persons in government positions, at least up into the 1930's and after World War II, have not been favorable toward or-

ganized labor. In addition, employer groups and farm groups have representatives who try to influence the thinking and action of government servants.

Recognizing these facts, the Congress of Industrial Organizations has broken sharply with tradition. With an ill-fated forerunner as an example, the Political Action Committee was established in 1943. Its efforts have met with varying degrees of success from time to time and place to place. One indicator of its success is the great animosity it has aroused, although this may be founded largely on the fear of conservative groups of what such a movement might do in the future. It has felt severe defeats, perhaps the most widespread coming in the elections of 1946. Despite this, it continues its efforts to improve its effectiveness. Whatever the future success of this particular organization, political action by organized labor is likely to continue and expand.

The American Federation of Labor in 1948 began moving reluctantly toward this philosophy. Although traditions crumble slowly, in one manner or another the Federation almost of necessity expanded its political action. The success of their economic actions, and those of the entire labor movement, depend on such an awakening and on cooperative action with other labor and liberal groups in our society.

### Questions

1. Is the formation of pressure groups for the purpose of trying to influence legislation compatible with democracy? Why or why not?
2. What conditions encourage the extension of government controls? What conditions discourage such extension? How?
3. Was the reluctance of the American Federation of Labor until after World War II to take a continuing and active part in political activity a wise policy? Why or why not?
4. What factors are the most important ones in determining the general attitude of a member of a legislative body or the judiciary?
5. Was the formation of the Political Action Committee a wise move? Has it been effective? What events can you cite to bolster your opinion?
6. To what extent should union members engage in political action as union members rather than as citizens of the community? Are their interests as unionists more basic to their own and to public well-being than their interests as citizens?



## CHAPTER VI

### EARLY COURT ATTITUDES: THE CONSPIRACY DOCTRINE AND LABOR INJUNCTIONS

#### Early American unions and the conspiracy doctrine

The development of the conspiracy doctrine and its application to labor in England has been reviewed in an earlier chapter. This doctrine proved to be an integral part of the common law of the United States and left an indelible mark on our judicial history. Although it was more directly used against labor prior to 1842, the doctrine has lived on in more subtle forms up to the present time. Relatively recent court decisions contain passages that show the imprint of the conspiracy doctrine on judicial thought.

While to those who are friendly toward organized labor the application of the conspiracy doctrine was considered highly undesirable, the situations in which the application was made did present knotty problems. The various applications of the conspiracy doctrine to be discussed all grew out of the collective action of a group of workmen seeking to do certain acts or gain for themselves certain advantages that are today taken for granted. But in the early nineteenth century, there was little or no statute law to govern the employer-employee relationship and there was no tradition of union action. Hence, concerted action by a union raised the question of what rights a group had to act in concert and what acts they could carry on, if any, without running afoul of the conspiracy doctrine. Clearly, in the first years of the nineteenth century as today, the concerted act of a group could not be considered in the same light as the same act when performed by an individual. Let us look at some of the early concerted activities that brought forth the American application of the conspiracy doctrine.

Professor John R. Commons, in his detailed study of the application of the conspiracy doctrine to organized labor in this country, found records of seventeen trials for conspiracy prior to 1842.<sup>1</sup> Records of some of the cases are incomplete but, from those that are complete, it seems clear that each followed a similar pattern. In each instance there was concerted action of workers that pre-

<sup>1</sup> Commons, John R., and Gilmore, E. A., *Documentary History of American Industrial Society*, Vol. III, p. 19, "Labor Conspiracy Cases." Cleveland: Arthur H. Clark Co., 1910.

sumably became too difficult for employers to cope with directly; otherwise, recourse to the courts probably would not have been needed. The workers were accused of conspiring to do acts in conflict with the common law; generally, the actions undertaken were not the basic question at issue, but rather it was the concerted planning or carrying out of the action that was contested.

The first recorded trial of a union of workers was in 1806, when the Philadelphia Cordwainers were tried on an indictment for a combination and conspiracy to raise their wages.<sup>2</sup> It was stated by the prosecution in the case that the action was taken "not from any private pique, or personal resentment, but solely . . . to promote the common good of the community; and to prevent in future the pernicious combinations, of misguided men, to effect purposes not only injurious to themselves, but mischievous to society." Throughout the hearing the point was made and reiterated that "what may be lawful in an individual, may be criminal in a number of individuals combined."

After rather lengthy hearings, the recorder of the court instructed the jury prior to its retiring to consider the case. With surprising simplicity and directness, the recorder stated, "A combination of workmen to raise their wages may be considered in a two fold point of view; one is to benefit themselves . . . the other is to injure those who do not join their society. The rule of law condemns both." Further, in the view of Mr. Levy, the recorder, "It is of no consequence, whether the prosecutors are two or three, or whether the defendants are ten thousand, their numbers are not to prevent the execution of our laws." As for labor, "They should neither be the slaves nor the governors of the community."

It is interesting to note that the law referred to was not statute law but rather common law. Thus, the rule of law that condemned the actions of the workers was nothing more than the opinion of an individual as to what the legal customs of the community should be. Clearly, in the absence of statutory statement and of precedent cases in this country, the opinion of the court, as voiced by Mr. Levy, was the factor that made the concerted attempt of a group of shoemakers to control their wages an unlawful action.

The jury found that the defendants' concerted action to ensure the maintenance of a certain wage rate made them guilty as indicted. The sentence of eight dollars and costs was not especially severe, but the precedent then established that an attempt to act together to raise wages was a legal conspiracy was disappointing to unionists and their supporters. To the extent that the ruling was applied,

<sup>2</sup> Full report of indictment and hearings reported in Commons, J., and Gilmore, E. A., *op. cit.*, pp. 58-236.

it meant that organized labor was hamstrung in pursuing one of its perennial goals. Although in America the predominant theory of strict government control, out of which the conspiracy doctrine had sprung in England, had been replaced with an espousal of *laissez faire*, the old attitude lived on and was used against labor in this country by persons who would have strongly backed *laissez faire* as applied to business.

Thus, to the shoemakers went the distinction of first tasting the conspiracy doctrine. Of the seventeen conspiracy cases tried prior to 1842, the shoemakers accounted for nine.<sup>3</sup> Other skilled groups that developed organizations early in our history also encountered the doctrine, and spinners, weavers, hatters, tailors, and plasterers found themselves brought into court. A few of the other cases will be of interest.

In 1823, the Hatters were tried for conspiracy because, in an attempt to maintain their wages, they had forced one Acker to be discharged because he worked for "knocked down wages."<sup>4</sup> The defendants were found guilty. In the decision so holding it was stated that:

"Journeyman confederating and refusing to work, unless for certain wages, may be indicted for conspiracy—for this offense consists in the conspiracy and not in the refusal; and all conspiracies are illegal though the subject matter of them may be lawful. . . . Journeymen may each singly refuse to work, unless they receive an advance in wages, but if they refuse by preconcert or association they may be indicted and convicted of conspiracy. . . . The gist of a conspiracy is the unlawful confederation, and the act is complete when the confederacy is made, and any act done in pursuit of it is a constituent part of the offense."

The shoemakers, as was previously noted, were involved in a number of cases. The case decided by the New York Supreme Court in 1835 was an interesting one.<sup>5</sup> The New York court essentially repeated the conspiracy doctrine, which was to be restated only seven years later by a more far-seeing jurist. Perhaps the somewhat broader action of the union in this case explains the sweeping ruling of the court.

The situation giving rise to this case was that journeymen shoemakers attempted to control not only their own wages but also those of persons not belonging to their organization. They agreed not to work for an employer who hired workers for less than the wage rates agreed upon. This dispute grew out of the employment of a

<sup>3</sup> Commons, J., and Gilmore, E. A., *op. cit.*, Vol. III, p. 21.

<sup>4</sup> *People v. Trequier et al.*, 1 Wheeler's Criminal Cases, 1942 (1823).

<sup>5</sup> *People v. Fisher et al.*, 14 Wendell 10 (1835).

man named Pemcock to make coarse boots in Geneva, New York for 75 cents per pair when the union was demanding one dollar per pair. The resultant strike forced Pemcock's discharge, and the union would not permit his reemployment in that area.

In holding the action of the union to be unlawful, Chief Justice Savage said for the court:

"The conspiracy in this case was not to commit an offence . . . : the raising of wages is no offence—the conspiracy is the offence; if any has been committed.

"The man who owes an article of trade or commerce is not obliged to sell it for any particular price, nor is the mechanic, obliged by law to labor for any particular price. He may say that he will not make coarse boots for less than one dollar per pair, but he has no right to say that no other mechanic shall make them for less . . . all combinations . . . to effect such an object are injurious, not only to the individual particularly oppressed, but to the public at large."

#### The case of *Commonwealth v. Hunt*

Seven years later, the Chief Justice of the Massachusetts Supreme Court handed down a ruling on the application of the conspiracy doctrine to organized labor that is generally taken to mark the end of the line of cases holding that concerted action is as such a conspiracy. As will be shown later, the conspiracy doctrine lived on in other forms and has caused organized labor much trouble. However, after 1842 it was held that concerted action was unlawful if it interfered with interstate commerce or if it was held to cause or threaten irreparable damage to property. Thus, although 1842 did not mark the death of a doctrine, it did mark an important stride toward the release of labor from court control.

The situation leading up to the case of *Commonwealth v. Hunt*<sup>6</sup> was the strike of seven men, essentially for the closed shop. The seven agreed among themselves not to work with non-union men. As a result of this agreement, they were brought into court charged with conspiracy to impoverish Jeremiah Harne, who refused to join the union, and to impoverish the master cordwainers of Boston by refusing to allow them to employ anyone they chose. Again the question was one of what action was prohibited by the common law; there was no statute involved.

In examining the case, Chief Justice Shaw, an eminent and widely recognized jurist, first noted the manner in which the indictment was drawn. In commenting on this, Justice Shaw spoke of the "qualifying epithets attached to the facts." Certainly this was the

<sup>6</sup> *Commonwealth v. John Hunt et al.*, IV Metcalf (45 Massachusetts) (1842).

case; the indictment was so drawn as to cast every possible doubt on the reasonableness, the honesty, and the legality of the action of the union men. For example, the first count of the indictment accused the defendants of ". . . unlawfully, perniciously, and deceitfully designing . . . to . . . form . . . an unlawful club . . . and make unlawful rules . . . and unlawfully and unjustly to extort great sums of money . . . ." In the third count, the state alleged that the defendants were "wickedly and unjustly intending unlawfully to impoverish one Jeremiah Harne . . . ." These phrases from the indictment show that there was an extreme bias against the concerted action of workers, but it was not an unusual attitude for 1842, especially in the light of earlier court rulings.

Chief Justice Shaw's remark concerning the qualifying epithets of the indictment gave an indication of the manner in which he was to rule on the case. As he pointed out, the action that was contested was the agreement by union members not to "work for a person, who, after due notice, should employ a journeyman not a member of their society. Supposing the object of the association to be laudable, or at least not unlawful, are these means criminal? The case supposes that these persons are not bound by contract, but free to work for whom they please, or not to work, if they so prefer. In this state of things, we cannot perceive, that it is criminal for men to agree to exercise their acknowledged rights, in such a manner as best to subserve their own interests." This part of the ruling was indeed significant. Prior to that time, concerted action in itself had been unlawful regardless of the aim or means. Now, according to the dictum of Justice Shaw, either the goal of concerted action or the means of attaining that goal must be unlawful before the conspiracy was indictable. In other words, the modern definition used by Justice Shaw was that a conspiracy was "a combination of two or more persons, by concerted action, to accomplish some unlawful, oppressive, or immoral action, or to accomplish some purpose, not of itself unlawful, oppressive, or immoral, by unlawful, oppressive, or immoral means."

As to the agreement not to work for an employer who employed non-union men or those whose dues were unpaid, the court held it to be "simply . . . an agreement . . . not to work. . . . It sets forth no illegal or criminal purpose. . . ." And, in conclusion, Justice Shaw ruled that "associations may be entered into . . . to adopt measures that may have a tendency to impoverish another . . . and yet so far from being criminal or unlawful, the object may be highly meritorious and public spirited. The legality of such an association will therefore depend upon the means to be used for its accomplishment. If it is to be carried into effect by fair or honorable and lawful means, it is, to say the least, innocent."

So ended one chapter in the history of the conspiracy doctrine. It was to continue, but no longer was unified action as such to be held unlawful without some other basis on which to rest the court ruling. It is impossible to determine the extent to which the court rulings retarded the union movement. Certainly the history of American trade unions in the first half of the nineteenth century was one of many experiments and many failures. It seems doubtful that there would have been a strong union movement at that time even if there had been no conspiracy doctrine; the conditions were not ripe for a strong, unified labor movement. Unionism was at that time in an experimental stage. It had not proven itself and there was no widespread knowledge of or experience with unions. Also, there were at that time alternative opportunities for workers: if they became especially dissatisfied with their work, there were other jobs and cheap land available.<sup>7</sup> As a result, there was not enough class or job consciousness to form the basis of a strong worker organization.

Under these conditions, it was to be expected that early nineteenth century unions would be impermanent and weak. Another reason for attributing relatively little effect to the court rulings is the lightness of the sentences levied. First of all, in a number of cases the union members were found not guilty. In most of the suits, however, they were found guilty but were usually given very light sentences. In a number of the cases reported by Commons and Gilmore the defendants were fined one dollar each and costs, and in all other reported cases but one the fines were less than ten dollars per person. In the one exception,<sup>8</sup> the president of the union was fined \$50, one conspicuous member fined \$100, and the other union men fined \$50 each. Thus, the fines levied certainly were not a great deterrent to union action. However, the psychological effect of a number of adverse rulings, even with token punishment, would have been to dampen union enthusiasm. There is no way of separating this psychological factor from other deterrent conditions that were operative in the first half of the nineteenth century.<sup>9</sup>

Despite the fact that *Commonwealth v. Hunt* popularized the

<sup>7</sup> The hardship involved in traveling to the location of the cheap land and in beginning a new way of life made it difficult, but not impossible, for workers to take advantage of the land that was available.

<sup>8</sup> *People v. Faulkner et al.*, reported in Commons, J., and Gilmore, E. A., *op. cit.*, Vol. IV, p. 315.

<sup>9</sup> Professor Witte is inclined to minimize the importance of the pre-1842 cases. In his opinion, few of the cases showed a strong anti-union bias, and the anti-labor rulings that were rendered rested primarily on the methods used. Only in two cases was concerted action to raise wages held indictable as conspiracy. Witte, E. E., "Early American Labor Cases." *Yale Law Journal*, May, 1926, Volume 35, No. 7, p. 825.

modern definition of conspiracy and finished the doctrine that conspiracy and concerted action were synonymous, it did not mark the end of the doctrine as applied to organized labor. The Massachusetts court was not binding on other courts; despite the new emphasis and interpretation, the early conspiracy cases were still precedent. There were more conspiracy cases in the last half of the nineteenth century than in the first half. In fact, three cases were reported in the twenty years following the *Commonwealth v. Hunt* decision and eighteen cases were reported between 1863 and 1880.<sup>10</sup>

As a result of the continuation of conspiracy cases, the post-Civil War unions urged the abolition of the conspiracy laws, that is, the court application of the conspiracy doctrine. The union demands were not very effective; a few states, such as Pennsylvania, New York, New Jersey, Maryland, and Illinois, passed laws supposedly giving protection against abusive application of the conspiracy doctrine. But the laws availed the unions little; in Pennsylvania, after the "protective" law conspiracy cases were still heard in the courts. For example, a group of miners was tried for conspiracy. Fines and thirty-day jail sentences were the penalty for organizing and presenting demands to the mine owner. Other conspiracy trials also resulted in fines and imprisonment. Witte reports at least fourteen conspiracy cases in Pennsylvania alone during the 1880's. It is interesting to note that the head of the Knights of Labor, Terence Powderly, attributed the discontinuance of the secrecy of the organization to a conspiracy trial brought against a local group of the Knights.

#### Labor injunctions

Since the 1880's, prosecutions of union groups for criminal conspiracy have not been frequent. This changeover has not been due so much to a change in the general attitude of the courts—at least not until the 1930's—as to the development of a more effective and convenient technique.<sup>11</sup> Professor Witte believes this change occurred "solely because injunctions became the usual form of action in legal controversies growing out of labor disputes."<sup>12</sup> In fact, in his opinion, the courts were less friendly to labor unions during the 1880's than they had been earlier.

Thus, criminal conspiracy proceedings were abandoned for something new and different. But the general unfriendliness of the courts, the legislatures, and the public toward effective union action

<sup>10</sup> *Ibid.*

<sup>11</sup> Commons, J., and Andrews, J., *op. cit.*, p. 383.

<sup>12</sup> Witte, *op. cit.*, *Yale Law Journal*, p. 834.

was not dropped. The conspiracy doctrine and the attitude exemplified by it lived on in government action to prohibit interference with interstate commerce and the mails, and later in action to prevent "irreparable damage to property."

Government action to forbid combinations and conspiracies in restraint of interstate commerce is discussed in the following chapter. In the remainder of this one the development and use of the labor injunction will be examined. Before turning to this subject, let us note the nature and purpose of injunctions. An injunction is an order of a court sitting in equity directing that an act be done or, more probably, not be done.<sup>13</sup> That is, an injunction is an order of a judge usually forbidding certain action; theoretically, injunctions are issued only to prevent irreparable damage to property. A labor injunction is so named because it is a court order issued during a labor dispute, or prior to a labor dispute if it can be proven to the satisfaction of the judge that irreparable damage to property is threatened by actions taken or likely to be taken. In a great majority of cases, it is issued at the request of management and directs or forbids certain action by workers.

If an employer seeks an injunction during a labor dispute, he will begin by filing a bill of complaint in a court having jurisdiction.<sup>14</sup> The bill of complaint will indicate the property of the plaintiff and the acts of the workers that threaten the property. This is likely to be stated at length, with a strong case made that the workers have conspired or are conspiring to do irreparable damage to property. Finally, the bill of complaint will request relief, specifying, in most cases, the exact nature of the relief sought; namely: an injunction which it is hoped the judge will issue, the form of which is prepared by the plaintiff's attorney. A study of injunctions issued in Ohio state courts in the early 1930's brought the conclusion that "the injunction itself is rarely written by the judges."<sup>15</sup> Unless some disagreement develops over the wording or provisions that necessitates some reorganization or rewording by the judge, the order is a product of the plaintiff's attorney.

If, on the basis of the complaint and any evidence or affidavits filed, it is thought that relief should be granted, a temporary restraining order may be issued. Such an order, supposedly to apply for

<sup>13</sup> For a technical discussion and definition of the injunction see: *Prentice-Hall Labor Course*.

<sup>14</sup> For a more complete discussion of injunction procedure see: Witte, E. E., *The Government in Labor Disputes*, Ch. V. New York: McGraw-Hill Book Co., Inc., 1932. Frankfurter, F., and Greene, N., *The Labor Injunction*, Chs. II and III. New York: The Macmillan Co., 1930.

<sup>15</sup> Mathews, Robert E., and others, "Survey of Ohio Practice in Issuance of Labor Injunctions." *Ohio State University Law Journal*, June, 1939, Vol. 5, No. 3, p. 294.



only a few days, is for the purpose of maintaining the *status quo* until an examination of the situation can be made and the merits of the issues determined. But in a labor dispute it is impossible to maintain the *status quo*. Every day of such a dispute changes the relative bargaining strength of both parties, and it requires more than a court order to put relative bargaining power in a state of suspended animation from which it will emerge just as it entered.

The temporary restraining orders issued have been among the worst abuses of injunctive practice. As was noted above, they usually are not drawn by the issuing judge. Sometimes the writs are not even issued from a court, but rather from the judge's home or wherever he may be found.<sup>16</sup> Thus, in many cases future hearings may prove that a temporary restraining order should be modified before extension or perhaps denied. But when such a determination is made after hearing, the dispute may well have been lost in many cases. And the practice of posting a bond that would be forfeited in case it develops after hearing that the order should not have been issued does not offer adequate redress. How can anyone estimate the amount of loss to a union from an unreasonably restrictive order that may have limited the effective prosecution of a strike or other bargaining technique?

When a complaint is filed a time should be set for a preliminary hearing to determine the validity of the complaint and the future action that should be taken. Since passage of the Norris-LaGuardia Act, such hearings in federal courts are to be held within five days and supposedly within ten days in most state courts, but in many instances postponements make the waiting period longer. In an extremely unusual case, over two years elapsed between the issuance of the temporary restraining order and the temporary injunction.<sup>17</sup> After the preliminary hearing, the judge may extend the restraining order, continue it in modified form, or refuse injunctive relief.

Temporary injunctions usually are the last stage of injunctive relief issued by the courts because the dispute usually is resolved in some manner during the extremely long time that elapses between the restraining order and the full trial, which is held in many instances prior to issuance of a permanent injunction. Of course either party may appeal a case centering on the issuance of either a temporary or permanent injunction, but this is not true with respect to a temporary restraining order.

Since an injunction is an order issued by a judge, it is, in case of violation, enforceable through contempt of court action. In the past,

<sup>16</sup> *Ibid.*, p. 315.

<sup>17</sup> *Ibid.*, p. 92.

and to a large extent up to the present time, the judge whose injunction has been violated is the one who tries the case. Considerable question may be raised as to the absence of bias in a judge who has seen one of his orders flouted. Persons guilty of contempt may be fined or imprisoned or both, the only limit on the severity of the sentence being a degree of unreasonableness sufficient that a higher court would not uphold the action of the lower court.

It has been pointed out that injunctions are intended to prevent irreparable damage to property. As long as the concept of property was one that held physical goods only to be property, the potentiality of the doctrine was not great; if property was only physical goods, then physical violence was necessary to cause damage. But before the close of the nineteenth century, the Supreme Court began to look upon the right to do business and free access to commodity and labor markets as property.<sup>18</sup> When these intangible rights began to be so considered, the problem of preventing irreparable damage to property became much more complex. A "black look" or a threat of physical violence could not break a window or destroy a machine, and under the concept of property as things physical, such actions would not be subject to injunctive prohibition. But when the right to sell or buy goods on the market and to operate one's business in search of profits came into the definition of property, many acts that had not done so before threatened irreparable damage. The "black look" or threat might be enough to keep workers away from a plant and thus interfere with the right of the owner to do business. Or the boycott or threat of a boycott of a dealer might cause him to refuse to handle the product of some firm; again this was an interference with the right to do business.

Thus, the broadening of the concept of property made the labor injunction a much more effective anti-labor weapon. The practice, which was so discouraging to labor, was, however, quite in keeping with court attitudes and philosophy. Nevertheless, organized labor attacked the injunction on the basis of its protection of intangible rights.<sup>19</sup> It is interesting to note that despite these attacks, the injunction-controlling legislation finally enacted by the federal government did not deny the right to protect rights where irreparable damage was threatened, and other specified conditions were fulfilled.

Complete agreement is lacking on when the first injunctions in labor disputes were issued in this country. It is agreed, however,

<sup>18</sup> For example see: *Adams Express Co. v. Ohio*, 165 U. S. 194 (1897), rehearing 166 U. S. 185 (1897). This was a rather complete but not the first statement of the new concept.

<sup>19</sup> Witte, E. E., *The Government in Labor Disputes*, p. 105.

that Great Britain gave a precedent for labor injunctions in the *Springhead v. Riley* case of 1868.<sup>20</sup> However, the British courts did not cultivate the injunction to which they had given birth. The American courts, despite the failure of the British to develop the legal tool, made widespread and effective use of injunctions in labor disputes. The first injunctions in this country probably were issued in the 1880's,<sup>21</sup> but widespread use of this weapon came after 1895.

There were at least two causes for the rapid development of injunctions after 1895. One was the expansion of the definition of property to include intangible rights thereby creating a much broader field for protection. A second cause was the ruling of the Supreme Court in the *Debs* case.<sup>22</sup> This case, discussed in the following chapter, called attention to labor injunctions and their effectiveness. Aside from the general publicity which accompanied the strike that gave rise to the *Debs* case, the statement of Eugene V. Debs, President of the American Railway Union, that the injunction did the most to break the strike testified to the effectiveness of injunctions. Small wonder, then, that use of the injunction began to increase rapidly.

Examination of the number of labor injunctions issued in various decades shows how the institution grew. It has been estimated that up to mid-year 1930 nearly 1850 injunctions were issued in labor disputes. Of these, it was estimated that 28 were issued in the 1880's, 122 in the 1890's, 328 from 1900 through 1909, 446 from 1910 through 1919, and 921 from 1920 through April, 1930.<sup>23</sup> This list may not be a complete one; many injunctions are issued by the lower courts, and, especially in the early years, were issued without proper records being kept. Since many injunctions may not be properly reported, some of them may escape detection. For example, a study of 55 injunctions issued in Ohio in the mid-thirties showed that only eight were recorded.<sup>24</sup> Thus the evidence that is available would indicate that there have been more injunctions than those that have been discovered.

While the figures cited above are, of necessity, estimates, no comparable data are available concerning the issuance of labor injunc-

<sup>20</sup> *Springhead Spinning Co. v. Riley*, L. R. Equity, 551 (1868). See above, Ch. III.

<sup>21</sup> Frankfurter, F., and Greene, N., *op. cit.*, p. 21, reports the earliest writs in the 1880's. Witte, E. E., *The Government in Labor Disputes*, p. 83, places the first injunctions in "the early 1880's." Landis, J. M., and Manoff, M., *Cases on Labor Law*, pp. 39-40, reports that the origin of the injunction in American labor disputes "dates back to the Railway Strike of 1877." However, appreciable expansion of the injunction came in the 1880's.

<sup>22</sup> *In re Debs*, Petitioner, 158 U. S. 564 (1895).

<sup>23</sup> Witte, E. E., *The Government in Labor Disputes*, p. 84.

<sup>24</sup> Mathews, R. E., and others, *op. cit.*, p. 292.

tions since 1930. It is known that after the passage of the Norris-LaGuardia Act in 1932<sup>25</sup> the number of writs issued by federal courts was curtailed sharply, but their issuance was not entirely stopped. Although some states have enacted laws that restricted the issuance of orders by the state courts, many others did not do so. Consequently, the labor injunction has continued to be a knotty problem throughout the first half of the twentieth century.

#### Evaluation of labor injunctions

Since the general tenor of the discussion of injunctions in labor disputes has been critical, it is desirable at this point to examine the inherent abuses that warrant such a condemnatory attitude.<sup>26</sup> Some of the criticisms to be made have already been noted and need only be recalled to mind at this point. Among these is the fact that injunctions have been used to protect expectations as well as physical goods and that such extension has made the question of irreparable damage much more complex. A second objection noted was that in many cases temporary restraining orders have been issued *ex parte*, or without hearing. Although these writs are supposed to maintain the *status quo* while an investigation can be made, it has been stressed that in reality the relative strength of the parties to a labor dispute changes with every day that the stoppage continues. In addition, it has been noted that in many cases the supposedly temporary restraining orders have been extended until such time as the situation has changed entirely.

A third criticism of the use of injunctions in labor disputes is the coverage of the writs. In many of the injunctions issued, union leaders and members are enjoined from certain activities; then some such catch-all phrase as "and all persons whomsoever" is added. If an injunction is so worded and is held to apply to "all persons whomsoever," the result is that the courts are, in essence, legislating. For when a government body makes rules for action in certain cases and these rules apply to all persons, the rules are essentially law. Legislating certainly is not normally thought of as a desirable function of the judiciary. In addition, the virtue of regulating some of the actions of persons entirely removed from a labor dispute under the guise of protecting property seems questionable.

Another undesirable feature of injunctions in labor disputes is the wide variety of actions that are enjoined. Prohibitions are in many cases sweeping and include activities that are not in themselves un-

<sup>25</sup> See below, Ch. XV.

<sup>26</sup> Frankfurter, F., and Greene, N., *op. cit.*, Chs. II and III, offer pertinent criticisms. Witte, E. E., *The Government in Labor Disputes*, Ch. V, evaluates injunction procedure.

lawful and which have a very elusive relationship, if any, to property damage. For example, Ohio state court injunctions of the mid-thirties forbade, in one or more cases, the following actions: peaceful picketing, giving *any* publicity to a dispute, public assembly, persuasion to join a union, persuasion to breach a contract or to terminate a contract, and persuasion not to seek employment in the plant where a dispute existed.<sup>27</sup> Other injunctions have run the gamut of possible prohibitions. In one extreme case, union men were forbidden to display signs or banners within ten miles of a struck mine, and the injunction required that pickets be citizens and able to speak English.<sup>28</sup> Other injunctions often have forbidden the annoying of workers who remain on the job, one going so far as to prohibit "black looks." Other judges have assumed that there is no such thing as peaceful picketing and have acted accordingly. From these examples it is clear that prohibition of injunctions is oftentimes far-reaching and extremely difficult for a union to obey to the letter without abandoning all semblance of bargaining out an issue that has reached the stage of a work stoppage.

Still another criticism is pertinent. It is a common situation for the sympathies of the average judge to be more closely allied with the employer than with the employee. Therefore, it is probable that employers will find a tendency among judges to look with favor on their requests for injunctive relief. The judge understands their needs and interests much better than he does those of the workers. In many instances, by birth, training, and background the judge has few contacts with and little understanding of the working classes and their interests and needs.

The preponderant majority of injunctions issued at management's request and to protect their interests is not complete proof of the point made in the preceding paragraph, but is worth noting. Witte reports only 43 injunctions issued on behalf of labor as contrasted with 1845 issued at the request of employers.<sup>29</sup> The study of Ohio injunctions showed 51 in which the employer was plaintiff and only four in which the workers were plaintiff.<sup>30</sup> In addition, of these four cases, two were injunctions against other employee groups, so that actually only two were cases of employees against employers. In good part, this dearth of pro-labor injunctions is due to the fact that organized labor has not developed the practice of asking help from the courts. But, in part, the failure of workers to take this

<sup>27</sup> Mathews, R. E., and others, *op. cit.*, p. 319.

<sup>28</sup> Preliminary injunction of September, 1927, issued on behalf of the Clarkson Coal Mining Co. against the United Mine Workers of America by Federal District Judge Benson W. Hough. Quoted in full in Frankfurter, F., and Greene, N., *op. cit.*, Appendix V.

<sup>29</sup> Witte, E. E., *The Government in Labor Disputes*, p. 234.

<sup>30</sup> Mathews, R. E., and others, *op. cit.*, p. 292.

step is probably due to their deep-seated distrust of the courts, a feeling that is widespread.

Whereas the abuses of injunctions noted above are clear, the effect of injunctions on the outcome of labor disputes is not so clear.<sup>31</sup> It is impossible in any set of circumstances to know what would have happened if something else had not happened. In the instance of a labor dispute in which an injunction has been issued, it is impossible to determine what would have been the course of events if there had been no injunction. As far as violence is concerned, it is doubtful if injunctions do much to prevent it, for it is unlawful even without the judicial order. Nor is an injunction likely to have any effect on the quality or quantity of police protection afforded to property. On the other hand, court orders disallowing secondary boycotts have in many instances been successful.

Perhaps the most significant result of injunctions was the psychological effect on the workers upon whom they were served. The experienced labor leader who knows something about such orders may not be especially frightened. But to the ordinary workman, uneducated and inexperienced in legal terminology and in what are his lawful rights, an injunction may be quite effective. Especially where labor is unorganized or weakly organized this is likely to be the case.

Whatever the real effects of labor injunctions, organized labor has for the past fifty years, whenever faced with injunctive restrictions, been strong in its denunciation of the device. The opposition to injunctions merged in the early years of the twentieth century with the opposition to the application of the anti-trust laws to organized labor. This was probably a result of the fact that some of the early injunctions, in the Debs and Bucks Stove and Range cases,<sup>32</sup> were issued in disputes that revolved around labor activities that restricted interstate commerce. The opposition to the anti-trust laws became especially strong on the part of the American Federation of Labor after 1908, when Samuel Gompers, then President of the organization, was found guilty of contempt of court and given a jail sentence, which, because of legal technicalities, he did not serve. This was enough to convince the Federation that no one was exempt from the anti-trust laws or the injunction.

#### Labor injunctions and the Clayton Act

In 1914, the strong drive of the American Federation of Labor bore fruit, so its leaders thought, in the passage of the Clayton Act. Although the major purpose of the act was to clarify the Sherman

<sup>31</sup> Witte, E. E., *The Government in Labor Disputes*, Ch. VI, examines the net results of labor injunctions.

<sup>32</sup> Discussed in the next chapter.

Anti-Trust Act of 1890, certain sections dealt with the labor injunction, the purposes for which it could be issued, the conditions under which it was to be issued, at whose request it might be issued, and the punishment for contempt of court. These sections merit careful examination.

Section 20 of the Clayton Act<sup>33</sup> seems, at first glance, to have provided exactly the protection that labor had been demanding. But, on more careful examination, it will be seen to have contained a sufficient number of "weasel words" to make the injunction provisions almost meaningless. The section provided:

"That no restraining order or injunction shall be granted by any court of the United States, . . . in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application. For which injury there is no adequate remedy at law. . . .

"And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto. . . ."

Careful reading of this section of the law shows that it did no more than state solemnly that that which was lawful prior to the passage of the Clayton Act was still lawful after its passage. Good injunctive practice prior to the Clayton Act had held that the injunction was only to prohibit irreparable damage to property. The Clayton law simply repeated good injunctive practices. As to the actions listed in the section which were not to be enjoined, they were relatively meaningless because of the judicious sprinkling of the words "peaceful," "lawful," "peaceably," and the like, through-

<sup>33</sup> 38 Stat. 780.

out the passage. It did not require a revision of the anti-trust laws to provide that a person or persons should not be prohibited from peaceably doing lawful acts.<sup>34</sup>

Section 17 of the act required that notice be given the defendants of the issuance of a temporary restraining order unless the employer's affidavit proved irreparable injury imminent. Sections 20 and 21 allowed a person accused of contempt of court to demand a jury trial if the act committed was a criminal offense under federal law or the laws of the state in which committed. In addition, to validate the demand for jury trial the contempt was to have been indirect, that is, not in the presence of the court or so close thereto as to interfere with the administration of justice. In practice, these provisions gave very little to organized labor.

It was Section 16 of the act that proved to be a real blow to labor, as far as the labor injunction was concerned. This section provided, in part, "That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws. . . ." The full import of this provision is not apparent without a knowledge of the anti-trust laws, which are the subject of the next chapter. Briefly, the situation under the Sherman Act was that only the government could ask an injunction against a violation of the anti-trust law. Under the Clayton Act, an individual was allowed for the first time to request injunctive relief from anti-trust violations. It will be seen later that, while the "protective clauses" of the Clayton Act really changed nothing, Section 16 did make a marked change and one that caused the anti-trust laws to be invoked against organized labor much more frequently than before.

#### Labor injunctions and the right to organize

While the movement for revision of the Clayton Act grew and bore fruit, an incident which was to give further testimony of the threat of injunctions to organized labor was being tested in the courts. This case, a landmark in governmental policy toward the right of workers to organize, was heard by the Supreme Court in *Hitchman Coal and Coke Co. v. Mitchell*.<sup>35</sup> In this case, the majority of the Court, by basing their opinion on legal technicalities, held that yellow-dog contracts (agreements not to become a union member while in the employ of a certain company) could be

<sup>34</sup> Berman, Edward, *Labor and the Sherman Act*, p. 101 ff. New York: Harper and Brothers, 1930, offers a brief but accurate evaluation of the labor sections of the Clayton Act.

<sup>35</sup> 245 U. S. 229 (1917).



protected by the issuance of injunctions.<sup>36</sup> The facts in the case follow. In 1907, after a strike, the Hitchman Coal and Coke Company announced its intention and reopened its mine on a non-union basis. On reopening, the company required all workers to agree orally that they were not and would not become members of the mine workers' union; later this was changed to a written agreement which all were required to sign. This yellow-dog contract stated specifically that the worker was not a member of the United Mine Workers Union and would not become a member while in the employment of the Hitchman company. Becoming a member of the union meant that the worker should sever his employment relationship with the company. Ignoring these agreements between the company and its employees, the United Mine Workers sent an organizer into the area. At the time, there was no attempt to call the men out on strike; the job was to get as many as possible to sign agreements to become members of the union. The names of those so agreeing were kept secret at the time.

In October, 1907, the company brought suit asking for an injunction to restrain the union from interfering with the relationships existing between the company and its workers. The District Court granted a sweeping injunction, basing its decision on two grounds: (1) that the union "was a common law conspiracy in unreasonable restraint of trade, and also and especially a conspiracy against the rights of non-union miners in West Virginia," and (2) that the union, although cognizant of the relationship between the company and its workers, "endeavored by unlawful means to procure a breach of these contracts by the employees." On appeal, the Circuit Court of Appeals reversed the decision of the lower court and held that an injunction was not allowable under the circumstances. The company then appealed the case to the Supreme Court.

The question at issue before the Court, therefore, was whether the company was entitled to injunctive relief under the circumstances. In examining the case, the Court considered only the rights of the company and not those of the employees. As the Justices put it, "The case involves no question of the rights of employees. Defendants have no agency for plaintiff's employees. . . ." This is indeed a naive point of view, for in employer-employee rela-

<sup>36</sup> The decision in the Hitchman case was not unprecedented; at least two previous cases had sanctioned yellow-dog contracts and discrimination against union members. In 1908, in *Adair v. U. S.* (208 U. S. 161) the Court declared void the provision of the Erdman Act of 1898 making it a crime to discriminate against an employee of an interstate carrier because of union membership. Again, in 1915, the Court held in *Coppage v. Kansas* (236 U. S. 1) that a Kansas statute prohibiting the use of the yellow-dog contract was repugnant to the fourteenth amendment.

tionships a right of one party is a duty of the other. Put another way, if the company is to be allowed to exercise its rights to hire only non-union workers, the right of any of its workers who wishes to join the union certainly is involved and it requires more than a Supreme Court statement to make the situation otherwise. The hypothetical opportunity to take another job if not satisfied with any condition is usually much more difficult to put into practice than to propose.

Because, as the Court saw the situation, no rights of employees were involved, the opinion, "That the plaintiff was acting within its lawful rights in employing its men only upon terms of continuing non-membership in the United Mine Workers of America is not open to question," is logical. And "there was no middle ground." There could not be an open shop; it must be either union or closed non-union. Following this line of reasoning, that the company was within its rights and that there was no middle ground, the Court held that "none of the men had a right to remain at work . . . after joining the union."

The Court recognized that the organizer for the United Mine Workers was only asking the men to agree to join the union when a sufficiently large number had signified such a willingness to warrant coming into the open. But, said the Court, a court of equity "looks to the substance of things and essence of things and disregards matters of form and technical nicety." Their reasoning, disregarding matters of technical nicety, was that persuading men to agree to join a union was simply another way of inducing them to join. Further, the Court pointed out that "when passing upon the rights of injunction, damage threatened, irremediable by action at law, is equivalent to damage done."

From these excerpts of Court reasoning it is clear that the Court was in no frame of mind to approve the opinion of the Court of Appeals, which had held in favor of the union. Other brief quotes, not a part of the thread of reasoning, also show the thought of the Court. For example, the decision speaks of the "ignorant, foreign-born miners," a description perhaps true in some cases, but not so universally as is implied. Whether or not the statement be true, the fact of foreign birth or limited educational opportunities does not seem to be relevant in any way to the legal rights of the two parties. In addition, reference is made to the demand that the company recognize the union "at the cost of its own independence." Certainly the recognition of a union and engaging in collective bargaining with the organization does take away some of the freedom to make any decision regardless of its effect on others. But, although

independence may have been restricted, certainly it is not lost. In addition, the restriction of the one makes possible greater freedom for others.

The Court admitted the legality of unions, but went on to warn of the "vast power" that accrued to them. Against this power individuals may be helpless; therefore, "it is the duty of government to protect the one against the many as well as the many against the one." The statement has an element of truth but various conclusions may be drawn from it. Certainly an individual should be protected from unreasonable deprivation of life, liberty, or property. But, on the other hand, in a complex society, and especially in economic life, one man's rights come in conflict with those of another. No person or institution is entitled to exercise, without any regard for others, his so-called rights, which, more accurately, are privileges extended by society rather than rights.

Even though there be serious doubts concerning the basis of the Court's opinion, the ruling was clear. The company was entitled to injunctive relief against the union for the following reasons: (1) attempting to unionize the employees; (2) attempting to persuade employees to agree to join the union in violation of the non-union agreement; (3) enticing workers to quit because the mine operated non-union; (4) trespassing on company premises for union business; or (5) persuading persons not to seek or accept work in the mine. An injunction against picketing and physical violence was denied because neither of these had occurred or been threatened. Thus, while restricting slightly the sweep of the District Court injunction, the Supreme Court upheld again the right of employers, through the use of injunctions and yellow-dog contracts, to deny to their workers the right to become union members.

As was true in numerous labor cases which were coming before the Supreme Court at that time, Mr. Justice Brandeis dissented. The dissent, concurred in by Mr. Justice Holmes and Mr. Justice Clarke, was of no avail, but is worthy of note because it marks the direction in which legislative and judicial thinking was to move. The dissent questioned the reality of the technical freedom of men to sign or not to sign yellow-dog contracts; it was recognized that economic necessity might force acceptance against the individual's will. Justice Brandeis held that the intent of the union to organize the mine was lawful. It was "part of a reasonable effort to improve the condition of workingmen engaged in the industry by strengthening their bargaining power through unions . . . , no conspiracy to shut down or otherwise injure West Virginia was proved. . . ." With the goal lawful, the aim of unionizing the mine was lawful unless some un-

lawful means were used in so doing. In this case, there was no violence.

In the opinion of the dissenters, the attempt of the union to persuade workers to agree to join the union at a later date did not amount to inducing a breach of contract. The contract specified that the employment relationship would be severed if the employees joined the union. When the company sought the injunction the workers were not union members, although some had agreed to join whenever the union officials decided the time was right. From these facts the dissenters drew the conclusion that "when this suit was filed no right of the plaintiff had been infringed and there was no reasonable ground to believe that any of its rights would be interfered with. . . ."

Thus, another item calling attention to the fact that labor injunctions were a serious threat to organized labor was put into the record. Many more such items were to come, but, although some extreme injunctions were yet to be issued or validated by the Supreme Court, they were issued under the anti-trust laws, supposedly to prevent control of or unreasonable influence on interstate commerce. The applications of the anti-trust laws will be examined in the next chapter.

As has been seen, the modifications of the Clayton Act were ineffectual so far as changes in injunctive policy were concerned. It will be noted in the next chapter that the act was equally ineffective as a modification of the application of the anti-trust laws to organized labor. Thus, the battle to control the injunction was still to be won; the movement that had failed in 1914 had to be revived and revamped. While the effort again was to secure legislative revision, organized labor also began to be conscious of the importance of the selection of judges and to take an active part in trying to influence such selections.<sup>37</sup> The injunction issue brought a political consciousness and activity, a consciousness and activity that was to smolder at some times and burn brightly at others. It was not to yield positive results until 1932.

### Questions

1. Is it reasonable to allow individuals complete freedom to act in concert or is there merit in the essence of the doctrine of conspiracy, that is, that concerted action gives an unreasonable amount of power? Why?
2. To what extent was the growth of the labor injunction related to the conspiracy doctrine?

<sup>37</sup> Witte, E. E., *The Government in Labor Disputes*, p. 125 ff.

3. To what extent did unfriendly legislative and judicial attitudes discourage union growth in the U. S. in the nineteenth century?
4. It is often said that the anti-trust laws have not been applied with equal zeal to business and to organized labor. What data can be offered to prove or disprove this opinion?
5. If the principle had been followed, early in the twentieth century, that the anti-trust laws were not applicable to organized labor, what would have been the effect of the precedent on recent federal labor legislation?
6. Why has organized labor not attempted to make greater use of injunctions in labor disputes?

## CHAPTER VII

### COURT APPLICATION OF THE ANTI-TRUST LAWS

#### The Sherman Anti-Trust Law of 1890

During the last part of the nineteenth century the government of the United States was giving at least lip service to the economic theory that free competition is desirable. As is often the case, theory and practice did not agree in many instances; there was, during this period, a strong trend among business groups to form trusts or other types of business combinations that were intended to eliminate real economic competition among many enterprises. This conflict between the prevalent philosophy and the frequently found practices of the time led to the enactment in 1890 of the Sherman Anti-Trust Act.<sup>1</sup>

The essence of the law was a prohibition of *every* combination or conspiracy in restraint of interstate or foreign commerce. This, the heart of the law, was placed without any preliminaries in the opening section of the act: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of misdemeanor. . . ." The punishment for such misdemeanor was to be a fine of not more than five thousand dollars or imprisonment of not more than one year or both. Section 2 prescribed the same potential punishment for every person who monopolized or *attempted* to monopolize or combine with any other person or persons to monopolize such trade. Thus, even an attempt at restraint of trade meant violation of the law.

Not content with potential imprisonment or fines as means of enforcing the act, Section 4 delegated part of the task of enforcement to the federal Circuit Courts. These courts were "invested with jurisdiction to prevent and restrain violations of this Act; and it shall be the duty of the several district attorneys of the United States . . . to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of peti-

<sup>1</sup> 26 Stat. 209, 1890.

tion setting forth the case and praying that such violations shall be enjoined or otherwise prohibited . . . the court may . . . make such . . . restraining order or prohibition as shall be deemed just in the premises." It was provided further that property owned by a combination or conspiracy could be seized by the federal government while it was "in the course of transportation from one state to another, or to a foreign country."

A final method of enforcing the law, and one that was destined to bring concerted opposition from organized labor, was embodied in the damage provisions set forth in Section 7. This section provided that "any person who shall be injured in his business or property by any other person or corporation, by reason of anything forbidden or declared to be unlawful by this Act, may sue therefor in any circuit court of the United States . . . and shall recover threefold the damages by him sustained, and the costs of suit. . . ."

The last section of the act, number 8, declared the words "person" or "persons" as used in the act "to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any State, or the laws of any foreign country." Despite this definition, the meaning of the act as regards organized labor was not clear. There is no agreement as to whether the Congress intended the law to apply to labor unions.<sup>2</sup> Whatever the intent of the Congress, the fact is that the law was used very effectively and frequently as a tool by employers with which to combat unions. The nature of congressional purpose may be of interest in this as in many other instances, but it seems an unnecessary debate because, irrespective thereof, it was soon to be made evident that the judiciary considered "every combination" to include organized labor. An examination of early court application of the act will show this fact clearly.

Within a few months of the passage of the act, in July, 1890, the federal government applied it against a business combination. Two years later the act was applied against a labor organization.<sup>3</sup> In *United States v. Workingmen's Amalgamated Council* the Circuit Court for the Eastern District of Louisiana held that the Congress had meant to include labor organizations when the law was finally written forbidding every contract or combination in the form of a

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<sup>2</sup> The Supreme Court held in *Loewe v. Lawlor*, 208 U. S. 274 (1908), that Congress did intend the act to apply to labor unions. More recent decisions raise questions of intent and becloud the ruling enunciated in the Loewe case. Berman, E., *Labor and the Sherman Act*, takes the position that Congress did not intend the act to apply to labor unions. Mason, A. T., *Organized Labor and the Law*. Durham: Duke University Press, 1925, voices the opinion that the intent was to apply to unions as well as other combinations.

<sup>3</sup> Berman, E., *op. cit.*, p. 60. *Prentice-Hall Labor Course*.

trust or otherwise in restraint of trade. This ruling was affirmed on appeal.<sup>4</sup> However, the case that set the precedent for the widespread usage of the Sherman Act against labor came in 1893.<sup>5</sup> The issues involved in the case are not important here, but, in the ruling of the judge, the opinion was voiced that a strike on the railroads would interfere with interstate commerce and that any railroad strike would be contrary to law. The stage was set for the future application of the anti-trust acts against labor. This first came in the Pullman strike.

### The Pullman strike and the Debs case

Although the opinion of the Supreme Court in the Debs case that arose out of the Pullman strike did not determine the applicability of the Sherman Act against unions, it did uphold the injunctions issued. An examination of the background of the case is therefore of interest. In 1894, workers of the Pullman Palace Car Company, who were members of the American Railway Union, were resisting a wage cut of 20 per cent or more that had been put into effect by the Pullman Company. The union, to support the strike of the Pullman employees, asked its members to refrain from working on railway trains to which Pullman cars were coupled. The strike spread and some violence occurred, although it appears that the greater part of the trouble came after federal troops were sent into the Chicago area.<sup>6</sup> In the attempt to stop all work and service on Pullman cars, which were a part of trains with mail cars attached, it was inevitable that interference with the mails would occur. Similarly, once violence broke out, some damage to property was equally inevitable. So also, if the Sherman Act were held to apply to labor unions, such action necessarily led to restraint of trade. Thus the federal government had a number of grounds on which to move against the strikers.

Consequently, in July, 1894, federal attorneys filed, in the Circuit Court for the Northern District of Illinois, a petition for an injunction to restrain Eugene V. Debs, president of the union, and all other persons from any action that would interfere with the mails or interstate commerce. The attorneys asserted that the strike was a conspiracy in restraint of trade. A temporary writ was issued on the day that the application was filed. The injunction issued has been characterized as "one of the most sweeping . . . on record."<sup>7</sup> It

<sup>4</sup> 54 Fed. 994 (1893).

<sup>5</sup> *Waterhouse v. Comer*, 55 Fed. 149 (1893).

<sup>6</sup> For a review of the events leading up to the strike and the issues involved see: Ware, N. J., *Labor in Modern Industrial Society*, p. 275. New York: D. C. Heath and Co., 1935.

<sup>7</sup> Berman, E., *op. cit.*, p. 65.



enjoined Debs, other officers of the American Railway Union and "all other persons whomsoever" from: (1) in any way or manner interfering with, hindering, obstructing, or stopping the trains entering Chicago carrying mails or interstate commerce; (2) "compelling or inducing or attempting to compel or induce, by threats, intimidation, persuasion, force or violence" any railway employees not to perform their duties, or "to leave the service of the railroads"; (3) "doing any act . . . in furtherance of any conspiracy or combination to restrain . . . railway companies in the free . . . control and handling of interstate commerce"; and (4) "ordering, directing, aiding, assisting, or abetting in any manner whatever any person or persons to commit any . . . of the acts."<sup>8</sup>

It is clear that the injunction was far-reaching and, in addition, was couched in terms that left considerable room for personal definition to suit the occasion. "All persons whomsoever" makes an injunction as widely applicable as a piece of legislation, in so far as certain specified activities are concerned. An injunction of such general applicability amounts to judge-made law protecting property from the damaging action of anyone. Equally undesirable was the vague phraseology of the writ prohibiting a person from inducing or attempting to induce another to do or refrain from doing certain acts. Many acts that might induce certain action were perfectly lawful.<sup>9</sup> Finally, this injunction helped to perpetuate the doctrine of conspiracy as applied to unions.

The injunction issued in the Debs case was a strikingly severe one with many undesirable features. Despite this fact, it served its purpose. Government attorneys asserted, shortly after its issuance, that Debs and others were guilty of contempt of court, and, after some delay in hearing the case, the court found Debs and associates guilty of contempt and sentenced them to from three to six months in jail. Those sentenced appealed to the Supreme Court for writs of error and *habeas corpus*.

From the point of view of Debs and the union, the suit was unsuccessful in that the petition for a writ of *habeas corpus* was denied. The resultant decision did not pass on the applicability of the Sherman Act in labor disputes, but did strongly support the use of the injunction in the strike. Holding that the United States had a "property right" in the mails, which serves as a basis for injunctive relief, the Court held that "the outcome, by the very testimony of the defendants, attests the wisdom of the course pursued by the

<sup>8</sup> *Ibid.*, p. 66. Italics mine.

<sup>9</sup> For example, telling the story of the issues involved in the strike might well induce others to strike; a person completely apart from the strike might violate the injunction by speaking disparagingly of the company or in favor of the union.

government" and that it had been desirable to seek relief from the courts as well as to send in troops. The Court denied that the injunction was "simply to enjoin a mob and mob violence" or that it was "to restrain the defendants from abandoning whatever employment they were engaged in." The purpose of the injunction was, according to the High Bench, "only to restrain forcible obstructions of the highways along which interstate commerce travels and the mails are carried."

It should be repeated that the Court did not enter into an "examination of the Act of July 2, 1890 . . . upon which the Circuit Court relied mainly to sustain its jurisdiction." The Court was careful to caution that this decision could not be interpreted as a dissent on the decision of the lower court. Rather, the justices preferred to rest their opinion "on the broader ground" of the interference with commerce and the mails.

#### Application of the Sherman Act

If there was any doubt as to the significance of the Sherman Act to organized labor, it was swept away in the Danbury Hatters case.<sup>10</sup> This case rose out of the attempt of the United Hatters of America to get Loewe and Company of Danbury, Connecticut, to operate on a closed shop basis. The request was not a surprising one, since seventy out of eighty-two hat manufacturers were operating under those conditions. However, the company refused the demands and a strike began in July, 1902. Following this, the union, in order to put more pressure on the company, began a secondary boycott urging wholesalers and retailers, the public, and especially unionists not to buy the firm's products. This boycott was widely publicized, and retailers and wholesalers were threatened with loss of patronage if they handled Loewe's products. As a result of this action, the company filed suit in August, 1903, for triple damages as permitted by Section 7 of the Sherman Act. The company asserted that the boycott had caused a loss of over \$88,000, which, when tripled, meant a potential damage payment by the union of over \$260,000. When the Circuit Court dismissed the case, the company appealed.<sup>11</sup> Finally, in 1908, the Supreme Court handed down a unanimous de-

<sup>10</sup> *Loewe v. Lawlor*, 208 U. S. 274 (1908).

<sup>11</sup> The decision of the lower court is of interest in view of the subsequent decision of the Supreme Court. With technical correctness, the Circuit Court held that the defendants were in no way engaged in commerce and the activities of the union were either to prevent the production of hats or curtail or destroy their distribution after movement in commerce had ceased. In either case, the goods were not in commerce at the time of the interference. Such an opinion disregarded the influence of work stoppages or other actions on the continuity of production and shipment of goods. If that attitude had been perpetuated by the Supreme Court much current federal legislation could not have been passed.

cision on the issue. Not only the opinion on the question at issue but some of the reasoning in the decision is significant.

In the unanimous ruling, the Court held that the Sherman Law, as stated, did apply to labor unions. As the Court viewed the issue, the phrase "any combination" used in the act was such as to include the union, defendant in the case. The Court stated that its opinion rested "on many judgments of this court, to the effect that the act prohibits any combination whatever to secure action which essentially obstructs the free flow of commerce between the States, or restricts, in that regard, the liberty of a trader to engage in business." With this reasoning, the United Hatters, supporting a boycott against the plaintiff, was a combination in restraint of trade. Nor did the fact that the defendants were not themselves engaged in interstate commerce alter the situation. The effect of a combination determined whether it was illegal. And, in the words of the Court, the United Hatters of North America was "a vast combination" whose program of organizing the hat-making industry was viewed as a "conspiracy or combination . . . so far progressed that out of eighty-two manufacturers of this country engaged in the production of fur hats seventy had accepted the terms and acceded to the demand that the shop should be conducted in accordance, so far as conditions of employment were concerned, with the will of the American Federation of Labor."

Some of the terms used in the passage quoted above are of interest and are indicative of the attitude of the Court toward unions. The conception of a union as a combination or conspiracy was reminiscent of a doctrine that had died, in theory, two-thirds of a century before. And the tone used indicated an assumption that the union was imposing its will on relatively defenseless companies. The idea of collective bargaining over matters of interest to both workers and employers did not figure, so far as can be seen, in the reasoning of the Court. In consideration of the attitude evidenced, the decision rendered is not surprising.

The particular significance of the ruling lies in the fact that for the first time the Supreme Court specifically held the Sherman Act applicable to unions.<sup>12</sup> In part, this may have been the result of varying degrees of effectiveness in arguing the case before the Court. Attorneys for the company devoted considerable time to attempting to prove that the law was applicable to unions as well as any other combinations, while the union lawyers did not pay any particular attention to the question. In the opinion of one scholarly student of the Sherman Act's application to labor, the Court based its very specific application of the act to unions on "the brief of the

<sup>12</sup> Berman, E., *op. cit.*, p. 80.

plaintiffs . . . rather than on a careful study of the debates. . . ."<sup>13</sup>

A second reason for the significance of the Loewe decision was that it made secondary boycotts illegal under the law—if they affected interstate commerce. Finally, in holding the union responsible for damages, and in a subsequent decision,<sup>14</sup> it was held that individual union members could be held pecuniarily responsible for actions of the union. This latter opinion came after several years of further litigation. After the 1908 decision, the case was remanded to the lower court for retrial. After two additional trials, the Circuit Court of Appeals in 1912 rendered a verdict against the United Hatters with a judgment for triple damages and costs amounting to \$252,000. This decision also was appealed to the Supreme Court, which handed down an opinion, in 1915, upholding the levying of damages against members of the union and its officers whether or not the members had been active during the dispute.

The decision of the Court was written by Justice Holmes, who voiced the opinion that it required "more than the blindness of justice not to see that many branches of the United Hatters and the Federation of Labor . . . made use of . . . lists and . . . boycotts in their effort to subdue the plaintiff." From this premise the Court reasoned that the retention of membership in and the payment of dues to the union made the members liable for the actions of their leaders. With this ruling, the union members were held by the highest Court to be pecuniarily responsible. Although there was further litigation, the question of responsibility did not enter.

The case was finally settled out of court, in 1917. Approximately \$234,000 was paid to the company, which accepted this amount despite an award of \$310,000. The American Federation of Labor raised some \$216,000 of the amount paid.<sup>15</sup> The final settlement, fifteen years after the original union activity that gave rise to the case, was another example of the exasperatingly slow movement of the judicial process.

Not long after the decision in the Hatters case, another opinion was handed down, again indicating clearly the restrictive effects of the Sherman Law as it applied to organized labor. In *Gompers v. Bucks Stove and Range Co.*<sup>16</sup> the Court again dealt with the subject of boycotts by a union seeking to bring pressure on a company. A dispute over hours of work led to the discharge of persons leading the movement for a nine-hour work day in the Bucks Company. Reinstatement was denied and the American Federation of Labor

<sup>13</sup> *Ibid.*, p. 83.

<sup>14</sup> *Lawlor v. Loewe*, 235 U. S. 522 (1915).

<sup>15</sup> Witte, E. E., *The Government in Labor Disputes*, p. 135.

<sup>16</sup> 221 U. S. 418 (1911).

took up the case, instituting a boycott against products of the Bucks Company. Various means were used to discourage the public and merchants from buying the products; among other measures, the Federation listed the name of the Bucks Stove Company on the "unfair" and "we don't patronize" lists carried in its publications. The company petitioned for and received injunctive relief, alleging that the boycott activities were harming their market. Samuel Gompers, President of the American Federation of Labor, and other officials ignored the injunction and the company's name appeared again on the "we don't patronize" list.<sup>17</sup> As a result, Gompers, Frank Morrison, and John Mitchell, officers of the Federation, were given one-year, nine-month, and six-month jail sentences for contempt of court.

The injunction, which had been secured in 1907, was dismissed at the request of the company, under new management, but the contempt case went on to the Supreme Court. While the contempt cases were dismissed on technical grounds, the Court laid down in its comments additional doctrine on the applicability of the Sherman Act to organized labor. Actually, the Court specifically applied to labor the general doctrine laid down in the Hatters case. As the Court stated its position, the anti-trust law:

"... covered any illegal means by which interstate commerce is restrained, whether by unlawful combinations of capital, or unlawful combinations of labor; and we think also whether the restraint be occasioned by unlawful contracts, trusts, pooling arrangements, blacklists, boycotts, coercion, threats, intimidation, and whether these be made effective, in whole or in part, by acts, words or printed matter.

"The court's protective and restraining powers extend to every device whereby property is irreparably damaged or commerce is illegally restrained."

#### Labor provisions of the Clayton Act

These decisions of the Supreme Court applying the Sherman Law to labor organizations touched off a concerted drive for revision of the anti-trust legislation that would remove the threat of such legislation to organized labor. The desired modifications of the anti-trust laws, in the eyes of organized labor, were to ensure definite legal status to unions, remove the conspiracy doctrine as applicable to organized labor, and limit the use of injunctions in labor disputes.<sup>18</sup> The prolonged agitation to eliminate the abuse both of

<sup>17</sup> For brief presentations of the background of this case see: Berman, E., *op. cit.*, p. 87 ff. Mason, A. T., *Organized Labor and the Law*, p. 162 ff.

<sup>18</sup> Mason, A. T., *Organized Labor and the Law*, p. 169.

the anti-trust laws and of the injunctions in labor disputes bore fruit in 1914, although it developed later that little if anything was gained for unions by the revisions. However, it was thought that the modifications of the anti-trust laws included in the Clayton Act were a deliverance for unions.

The two parts of the Clayton Act that were thought to mark an advance for organized labor were Sections 6 and 20. As Samuel Gompers saw these two sections, they were "Labor's Magna Charta" and "Labor's Bill of Rights," respectively. In view of the vague and high-sounding phraseology of the statements, Mr. Gompers' attitude and stated opinions are surprising. Opinions could hardly be further from the facts than were those of Mr. Gompers.

Section 6 provided, in part:

"That the labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor . . . organizations, instituted for mutual help; . . . or to forbid or restrain individual members from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the anti-trust laws."

Consideration of the wording of this section of the law will reveal the hollowness of the words. It was no more than a restatement of what was already considered good judicial doctrine. As Mason pointed out, no court had held that organized labor was subject to the anti-trust laws because the labor of a human being was a commodity or article of commerce.<sup>19</sup> The provision in question, whether or not drawn with that intention in mind, simply restated the legality of acts already looked upon as legal. When the rainbow from Mr. Gompers' shower of rhetoric had faded, unions found that their advance had been either negligible or non-existent.

Section 20 sounded equally well and meant equally little. It has been discussed and quoted in the preceding chapter; in it, as in Section 6, the lack of definite wording and the empty, high-sounding phraseology are the striking features. Again, the legislation stated nothing new or different. The restriction of injunctions to the prohibition of irreparable damage to property was only a legislative statement of good equity court practice. The inclusion of property and property rights in the guarantees extended by the law was a legislative sanction of the relatively new court doctrine that rights

<sup>19</sup> *Ibid.*, p. 176.

were to be construed as property just as is physical property. And the meaning of "irreparable" was as unclear as ever.

Denial of the right to require by injunctions that work stoppages be forsaken was only a restatement of a constitutional guarantee. And the permission of "peaceful" picketing at places where persons may "lawfully" be present left room for almost any interpretation of that right which a court wished to make. The question of when a person is "peacefully persuading" another is equally insoluble. All in all, Section 20 specified good injunctive practice and no more, and used sufficient meaningless verbiage to leave the courts a free hand to act in labor disputes as they saw fit.

Although not given the same amount of advance publicity as Sections 6 and 20, Section 16 contained provisions of much significance to labor. It will be remembered that under the Sherman Act government attorneys were responsible for seeking equity orders to aid in the enforcement of the act. Section 16 of the Clayton Act added one other very important means of enforcement. This provision read, in part:

"That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction . . . , against threatened loss or damage by a violation of the anti-trust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity. . . ."

Here, then, was a new means of enforcement; an injunction could be issued at the request of an aggrieved individual. Organized labor was soon to find that to it this provision was perhaps the most significant of all the rhetoric of the law. That fact was to be demonstrated by the Supreme Court ruling on a case that entered the courts at about the time the Clayton Act was passed. The case was the *Duplex Printing Press Co. v. Deering*.<sup>20</sup>

The Duplex Company was the only one of four manufacturers of printing presses that was not operating under an agreement with the International Association of Machinists. The failure of the union to organize the Duplex Company had resulted in notification by two of the companies previously organized that they would be forced to terminate their union agreements unless the Duplex Company were brought into line with regard to wages, hours, and so forth. In attempting to organize the plant, the union issued a strike call in August, 1913, but only twelve or fifteen persons out of a total of some 250 answered the call. It was clear that some other meas-

<sup>20</sup> 254 U. S. 443 (1921).

ure had to be taken if the Duplex Company was to be organized. Thus, the union embarked on a secondary boycott to stop the sale and installation of Duplex presses. The resultant case arose from the actions of union representatives in the New York City area.<sup>21</sup>

The presses manufactured by the Duplex Company required installation by machinists, and there was a large market for the presses in the metropolitan areas. When the Machinists' local unions in New York began to refuse to install and otherwise discouraged the use of Duplex presses the company brought suit against the business agents of certain locals of the Union. Although damages were requested, this part of the suit was not pressed and the decision hinged on whether or not an injunction could be issued for the company in view of the "protection" of labor provided in the Clayton Act. In considering the boycott and the methods by which it was carried on, the Court came to the conclusion that the company's right to produce printing presses and distribute them in interstate commerce was a property right and that the circumstances warranted the issuance of an injunction unless provisions of the Clayton Act specifically prohibited its issuance. This latter point was especially pertinent, since the refusal of the Circuit Court of Appeals to approve an injunction was based on the contention that the Clayton Act had legalized the secondary boycott. The conclusion of the lower court was, therefore, that no injunction was justified under the Clayton Act and its provisions.<sup>22</sup>

In searching for an answer as to what the Clayton Act did to the application of the anti-trust laws in labor disputes, the Supreme Court analyzed the wording of Section 6. In this instance the vague wording of the section became significant. As the majority of the Court saw the situation, "The section assumes the normal objects of a labor organization to be legitimate, and declares that nothing in the anti-trust laws shall be construed to forbid the existence and operation of such organizations or to forbid their members from lawfully carrying out their legitimate objects; . . . but there is nothing in the section to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects and engage in an actual combination or con-

<sup>21</sup> The discouraging acts of union representatives in and around New York included warning customers not to buy Duplex presses or, once having bought them, not to install them. Customers were threatened with sympathetic strikes and pressure was exerted on trucking companies not to haul the presses. Union men were threatened with loss of cards and blacklisting as scabs if they helped install the machines. Union repair shops were not to repair Duplex presses. Various other pressures were used. No method of trying to cut the purchase of Duplex presses was left unused unless directly violent. Violence was reportedly threatened in many instances.

<sup>22</sup> Berman, E., *op. cit.*, p. 105.



spiracy in restraint of trade." (*Italics mine.*) Shorn of all excess legal verbiage, the Court simply held that the vague wording of the Clayton Act did not change the situation existing before the law was passed.

With regard to restrictions on the issuance of injunctions imposed by Section 20, the Court held, in essence, that "it is but declaratory of the law as it stood before." Furthermore, any limitations that might arise from the act were applicable, in the opinion of the Court, only when the parties to the dispute had a "proximate and substantial, not merely a sentimental or sympathetic," relationship to the questions at issue. Nor was the fact that there was no violence in the boycott controlling in any way; "restraint produced by peaceable persuasion is as much within the prohibition as one accomplished by force or threats of force."

With this reasoning, the union was held by the Supreme Court to be limiting and restraining interstate commerce. Thus, according to the High Bench, "there should be an injunction against defendants . . . and all members . . . restraining them . . . from interfering or attempting to interfere with the sale, transportation, or delivery in interstate commerce of any printing presses. . . ." The ruling is of significance for a number of reasons: it shattered the rosy hopes of organized labor that the Clayton Act was a great step forward; it also showed the significance of the new section of the law permitting persons other than government representatives to secure injunctions (before the Clayton Act the Duplex Company would have been unable to obtain injunctive relief under the anti-trust laws unless it could have prevailed on a District Attorney to act in its behalf); also, it adopted a very narrow concept of what constitutes a labor dispute, for the Court construed a labor dispute to be confined to persons or groups standing in the relationship to each other of employer and employee. All in all, January 3, 1921, the date of the Duplex decision, was not a happy one for labor.

Mr. Justice Brandeis wrote a brief but pointed dissent with which Justices Holmes and Clarke concurred. This opinion, like many others from the Brandeis pen, rested heavily on the social and economic forces which were at play in the issue; his first analysis was of the factors in the industry that gave rise to the organizing campaign. He noted the fact that of the four producers of printing presses Duplex was the only one unorganized and that other companies insisted that Duplex be organized if they were not to sever their relations with the union. Moreover, as Mr. Justice Brandeis saw the question, the various members of the union did have a common interest in the case despite the fact that many did not have any direct relationship with the employer.

"In other words, the contest between the company and the machinists' union involves vitally the interest of every person whose cooperation is sought. May not all with a common interest join in refusing to expend their labor upon articles whose very production constitutes an attack upon their standard of living and the institution which they are convinced supports it? . . . the answer should, in my opinion, be: Yes, if as a matter of fact those who so cooperate have a common interest. . . .

"So, in the case at bar . . . upon the evidence introduced and matters of common knowledge, I should say . . . that the defendants and those from whom they sought cooperation have a common interest which the plaintiff threatened."

This concept, as voiced by Justice Brandeis, was one which was enacted in law, in essence, about ten years later. It was an important concept that showed a recognition of the social and economic realities of unionism. The essential basis of trade unionism is the assumption that a group of persons following the same trade or employed in the same industry have common problems that they may promote effectively by standing together as a unified group, thus making the problem of one or a small group the problem of a larger group. To deny this mutuality of interest of persons not having a direct employer-employee relationship is to threaten the entire organized labor movement.

While Mr. Justice Brandeis reached, by the above reasoning, the conclusion that "industrial combatants" have the right "to push their struggle to the limits of the justification of self interest," he had a general word of warning that is of interest in the post-World War II period.

"All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature which, while limiting individual and group rights of aggressions and defense, may substitute processes of justice for the more primitive method of trial by combat."

The lucidity of the reasoning in this passage and the clear and defensible logic on which it is based give it a dateless applicability. It is as valid a quarter of a century after its first statement as it ever was. And, like other of the dissenting opinions of Mr. Justice Brandeis, the dissent in the Duplex case was an opinion that turned out

to be a trail-blazer charting a course later to be followed by the Congress and the courts.

#### The suability of unions

The Duplex ruling was disillusioning to organized labor, which had expected too much of the Clayton Act. But workers had not heard the last of that law. A case that arose prior to the first World War and that was being fought through the courts during it was to demonstrate still further potentialities of the Clayton Act. The case of the *United Mine Workers of America v. Coronado Coal Company*<sup>23</sup> began in 1914. It was another suit for damages allegedly suffered as a result of violation of the anti-trust laws, but in this case it was a suit brought against the union as an organization rather than against individual union members, as was true in the Danbury Hatters suit.

The events leading up to the suit for damages began in 1914 when the receivers for the Bache-Denman Coal Company and eight other corporations controlled by Bache-Denman decided to discontinue operating their mines on a union basis and adopt the open shop instead. This decision ignored the fact that the company had an unexpired, signed contract with the United Mine Workers Union. The case carried through the courts bore the name of the Coronado Coal Company, owned by the Bache-Denman Company, although most of the action on which the case rested occurred at other mines in the vicinity—the western part of Arkansas. The company made preparations for opening some of its mines on a non-union basis. In an attempt to create a technical justification for ignoring the union contract, a holding company was set up, with \$100 capital, and this “hugger mugger corporation” contracted to operate the mines. Realizing that trouble might follow, management had cable strung around one of the mines to be opened, purchased rifles and ammunition, hired guards from the Burns Detective Agency, imported non-union workers, and notified former employees they must vacate company houses. In view of the clear intent, the union called a strike of the workers in the Coronado mine, which was still working on a union basis.

Violence first flared at one of the mines in April, 1914, when, in an unsuccessful attempt to get the company to change its plans, the guards were run off and considerable damage was inflicted about the mine. Later in the summer, following purchase of rifles by District 21 of the United Mine Workers, more serious violence

<sup>23</sup> 259 U. S. 344 (1922).

occurred, including the killing of some of the non-union employees and the burning and other destruction of mine buildings and coal already loaded in railroad cars and destined for delivery outside of Arkansas. As a result of the damage and destruction of property, the company alleged losses of \$740,000 and asked for triple damages, \$2,220,000 plus costs.

When the case was finally decided by the Supreme Court, eight years after the violence in Arkansas, the Court had several issues to determine. All, however, centered on the problem of whether the award of \$745,600 damages by the Circuit Court of Appeals was valid.<sup>24</sup> One of the problems at issue was whether the United Mine Workers Union, its District 21, and several local unions, being unincorporated, were subject to suit. The Court answered this question with untroubled simplicity and surprising directness: "We conclude that the International Union, the District No. 21, and the twenty-seven Local Unions were properly made parties defendant here and properly served by process on their principal officers." This decision is indeed significant, for it lays down the doctrine that even though unincorporated a union may be sued. Unions have decried this ruling, but have referred to it in many instances to prove that unions can be held liable and that further legislation on the question of pecuniary responsibility is not necessary.

The other important question to be answered was whether the actions of the union and its members constituted "a conspiracy to restrain and monopolize interstate commerce." Chief Justice Taft, writing the opinion in the case, gave much time and consideration to this question. He went at some length into the company's preparation for trouble and into the violence engaged in by the union. The conclusion finally reached was that "coal mining is not interstate commerce, and the power of Congress does not extend to its regulation as such." But even though coal mining *as such* was not subject to federal regulation, the Court held that:

"... if Congress deems certain recurring practices, though not really part of interstate commerce, likely to obstruct, restrain or burden it, it has the power to subject them to national supervision and restraint. Again, it has the power to punish conspiracies in which such practices are part of the plan, to hinder, restrain or monopolize interstate commerce. But in the latter case, the intent to injure, obstruct or restrain interstate commerce must appear as an obvious consequence of what is to be done, or be shown by direct evidence or other circumstances."

<sup>24</sup> Witte, E. E., *The Government in Labor Disputes*, p. 137.

Thus the Court upheld its previously established dicta<sup>25</sup> that the production of goods is not a part of interstate commerce, and yet it found an exception which could be used in any case under consideration. In the first Coronado decision the Court, while deploring the violence of the strike, did not see fit to make such an exception, however. In its opinion, the reported 5000-ton weekly output of the Bache-Denman mines was insignificant when compared to the national coal production of ten to fifteen million tons weekly. Further, the Court held that its study of the case showed "no evidence . . . that the outrages, felonies and murders of District No. 21 and its companions in crime were committed by them in a conspiracy to restrain or monopolize interstate commerce."

On the basis of this reasoning the Supreme Court denied the damages sought of the union and remanded the case to the District Court. Because the damages had not been granted the United Mine Workers thought they had won a victory.<sup>26</sup> However, Samuel Gompers, then President of the American Federation of Labor, who had been so completely wrong in his evaluation of the Clayton Act, was not misled. He denounced the decision, pointing out that even though damages were not awarded the Supreme Court ruling had essentially the same effect as the incorporation of trade unions. Even though his fears seem to have been somewhat overdrawn, subsequent events proved that the miners' union celebrated too quickly. The company submitted new evidence and the case was dragged through the hierarchy of federal courts again. The Supreme Court handed down its second ruling in 1925.<sup>27</sup>

The issue in the second case was to prove that the actions of the union were "intentionally directed toward a restraint of interstate commerce." The Court had already stated that the union could be held responsible as a union for damages, but had previously maintained that there was not sufficient evidence to show intent to restrain and that the amount of coal production involved in the case was negligible when compared with national production. On the latter point the company introduced evidence that the interrupted production was about 5000 tons per day rather than per week, which was sufficient to make the stoppage more significant to interstate commerce. The Court still was not convinced, however, that there was any intent on the part of the International organization to impede interstate trade; not so with the intent of District 21. With regard to that body the Court held that:

<sup>25</sup> In *Hammer v. Dagenhart*, 247 U. S. 251 (1918), and other cases.

<sup>26</sup> Witte, E. E., *The Government in Labor Disputes*, p. 137.

<sup>27</sup> *Coronado Coal Co. v. United Mine Workers of America*, 268 U. S. 295 (1925).

"... there was substantial evidence at the second trial in this case tending to show that the purpose of the destruction of the mines was to stop the production of non-union coal and prevent its shipment to markets of other states than Arkansas, where it would by competition tend to reduce the price of the commodity and affect injuriously the maintenance of wages for union labor in competing mines."

This decision was a heavy blow to organized labor, especially to the United Mine Workers Union. The Supreme Court had already held that the union was suable. Now, in the second suit, the Court was convinced of the intent of the union to interfere with interstate commerce. Therefore, under the anti-trust laws, the union was responsible for triple damages. Before the hearing of the third trial, the United Mine Workers settled the case out of court for a sum of \$27,500.<sup>28</sup> Thus, the final settlement of the case required more than thirteen years. The payment of \$27,500 was clearly only a token that in no way compensated for the damage done in the original dispute nor for the costs of litigation since that time. However, the two decisions established the suability of unions, a precedent that has not been followed in many cases. It seems somewhat unlikely that employer damage suits against unions will become common.<sup>29</sup> The late Professor Berman was of the opinion that the great amount of time consumed in the litigation of damage suits, twelve years in the Danbury Hatters case and thirteen in the Coronado case, for example, would discourage such action.

Perhaps the Coronado decision was of greater significance for its ruling on what constitutes a violation of the anti-trust laws. The decision of the case hinged on questions of intent to restrain commerce and on how substantial the restraint proved to be. The point of view taken in the ruling could be used to impose severe restrictions on labor organizations.<sup>30</sup>

This same general attitude could be and was used at a later date

<sup>28</sup> Berman, E., *op. cit.*, p. 128.

<sup>29</sup> In the event that unions be required to incorporate, some labor leaders feel that there would be many legal actions brought against unions and that a great portion of their time, energy, and expenses would be devoted to legal battles, thus taking the union away from its primary purpose, which should be the development of *bona fide* collective bargaining. There is considerable question as to whether this would be the result of incorporation. The very slow action of most courts would discourage such suits, unless for purely punitive purposes. Further, many employers would realize that such legal action would establish an atmosphere in which maintenance of reasonably peaceful labor relations would be most difficult. During its first months the Taft-Hartley law, which opened the way for suits against unions in certain cases, did not bring a great wave of suits for damages.

<sup>30</sup> See Berman, E., *op. cit.*, pp. 128-131, for a strong statement of this point of view.

as a basis of pro-labor measures and court rulings. Recognizing the importance of labor peace to the smooth flow of goods in interstate commerce, Congress enacted in the 1930's a number of laws extending to labor certain guarantees never before offered, such as the right to organize into unions without interference from employers and the right to a certain minimum wage. Moreover, the Supreme Court was able to see a justification for and a reasonableness in such legislation.

The foregoing discussion serves to emphasize the fact that there is opportunity for a variety of interpretations of the meaning of a certain principle or how it is applied. In 1922, the relationship of labor trouble to the flow of goods in interstate commerce served as a basis for a ruling in the first *Coronado* case that was potentially very dangerous to organized labor. Two years later, and only one year before the final *Coronado* decision, the Court held that a strike in a trunk and leather goods company that shipped most of its goods in interstate commerce was not a violation of the anti-trust laws nor an intentional and unreasonable restraint of trade.<sup>31</sup> But fifteen years later, under different circumstances, the same relationship was being used to arrive at a quite different type of labor law.

At least one more Supreme Court ruling must be noted in tracing the application of the anti-trust laws to labor. This case, like the *Duplex* case, is as significant for the dissenting opinion as it is for the dicta which the majority contributed to the subject of labor under the Sherman Act. Again, Justice Brandeis was the author of the dissent.

This case<sup>32</sup> arose out of the attempt of a union to organize certain employees by boycotting stone quarried by non-union workers. Until 1921, limestone quarrying and cutting around Bedford, Indiana, had been done pursuant to a union agreement with the Journeymen Stone Cutters' Association of North America. After that time, when unable to reach an agreement with the union, the companies operated under agreements with "unaffiliated," or company, unions. In the words of the Supreme Court, this amounted to "closing their shops and quarries against the members of the . . . Union." In an attempt to restore the union to its former bargaining position, its President issued a notice to members calling attention to the rule that union members were not to work on stone that had been quarried or cut by "men working in opposition to our organization." This ruling, when enforced, amounted to a boycott

<sup>31</sup> *United Leather Workers International Union v. Herkert & Meisel Trunk Co.*, 265 U. S. 457 (1924).

<sup>32</sup> *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Association of North America*, 274 U. S. 37 (1927).

by all union men of the non-union stone. And if union men could not be induced to work with the stone of these companies, many potential purchasers would refuse to buy the stone. The rule against working on this "unfair" stone was well-enforced, and the market of the disputing companies suffered accordingly. One company sought injunctive relief.

According to the Court, the evidence was clear that the union had no grievance against the local builders or purchasers of the stone. Therefore, as the Court saw it, the strikes against the local builders "were ordered and conducted for the sole purpose of preventing the use and, consequently, the sale and shipment in interstate commerce, of petitioner's products." The fact that the strikes or boycotts took place after interstate commerce had ceased was held to be unimportant. Declaring that local interferences "with no intention, express or implied," to restrain interstate commerce would not have violated the anti-trust laws, the Court proceeded to indict the actions of the union in the strongest terms: "these interferences were not . . . in pursuit of a local motive,—they had for their primary aim restraint of the interstate sale and shipment of the commodity. Interstate commerce was the direct object of attack."

In view of the reasoning sketched above, the ultimate decision of the Court is not surprising. Nevertheless, the wording used is striking and disturbing. With regard to the union actions, the Court stated that "it must be held to be a combination in undue and unreasonable restraint of such commerce. . . . An act which lawfully might be done by one, may when done by many acting in concert take on the form of a conspiracy and become a public wrong, and may be prohibited if the result be hurtful to the public or to individuals against whom such . . . action is directed." Such a statement might well have come from one of the conspiracy cases a century earlier. Although all concerted action cannot be justified, and especially that which results in public detriment, the Court's statement goes far beyond that idea. It can be interpreted to say that concerted union action that becomes effective against some individual is an unlawful conspiracy. This would include all effective action by unions, because it is only when union action is causing or threatening damage that an employer can be coerced into meeting certain union demands. Although time has shown that this ultimate potential of the decision never materialized, the threat was present and was recognized by unions.

From this reasoning the court held that it was "manifest that the acts and conduct of respondents fall within the terms of the Anti-Trust Act; and petitioners are entitled to relief by injunction."

The reasoning of Justice Sutherland and the majority of the Court



was not convincing to Justices Brandeis and Holmes; the former wrote a dissenting opinion with which the latter concurred. Here the reasoning was on the basis of the economic factors involved in the dispute and of equitable application of the anti-trust laws to labor and capital. Brandeis pointed out that the quarrying companies were relatively powerful, especially as members of their national trade association. The locals of the union were relatively weak. In view of the difference in bargaining power, the union instituted the effort to stop all work on "unfair" stone. The union made no attempt to obtain support from other unions or to keep business from concerns using the stone; their sole effort was peaceably to keep all of their members from working on the non-union product.

In Justice Brandeis' reasoning one of the very important questions was whether the interference with interstate commerce noted above was unreasonable. As he saw the situation, "it has long been settled that only unreasonable restraints are prohibited by the Sherman Law. . . . And the restraint imposed was, in my opinion, a reasonable one. The Act does not establish the standard of reasonableness. What is reasonable must be determined by the application of principles of the common law, as administered in federal courts." To the Justice, the absence of violence, intimidation, fraud, or general boycotts of businesses using "unfair" stone was especially important. Justice Brandeis concluded his dissent as follows:

"If, on the undisputed facts of this case, refusal to work can be enjoined, Congress created by the Sherman Law and Clayton Act an instrument for imposing restraints upon labor which reminds of involuntary servitude. The Sherman Law was held . . . to permit capitalists to combine in a single corporation 50 per cent of the steel industry of the United States . . . (and) to permit capitalists to combine in another corporation practically the whole shoe machinery industry of the country, necessarily giving it a position of dominance over shoe-manufacturing in America. It would, indeed be strange if Congress had by the same Act willed to deny to members of a small craft of workingmen the right to co-operate in simply refraining from work, when that course was the only means of self-protection against a combination of militant and powerful employers. I cannot believe that Congress did so."

Thus, again, as on many other occasions, Justice Brandeis spoke out urging an examination of economic and social factors and an equitable application of legislation to capital and labor. Certainly this was good advice, at least in the eyes of social scientists who are not especially interested in legal terminology.

### The demand for revision of the anti-trust laws

If there had been any doubt remaining in the minds of the leaders of organized labor as to the necessity of revising the application of the anti-trust laws to labor, the Bedford Cut Stone case removed that doubt. It was clear that effective collective bargaining could not be carried on without changes being made in court doctrine. Therefore, those who believed in the desirability of collective bargaining on a scale and in a manner that fitted it to cope with large scale industry and large accumulations of capital began a campaign for legislation to do what the Clayton Act supposedly had done in 1914. Since the enactment of the Clayton Law, the movement for revision of the application of the anti-trust laws had been combined with the demand for an anti-injunction law, much of the injunctive control exerted since 1914 having been based on the prevention of actions that restrained interstate commerce and harmed business.

From an economic standpoint, the drive for revision was thoroughly defensible. In view of the many issues arising out of the employer-employee relationship over which the two parties have widely divergent points of view, it is evident that many questions can be resolved only by bargaining or by law. It is equally clear that there can be no effective, *bona fide* collective bargaining unless there is a reasonable degree of equality of bargaining power between employers and their workers. With the development of large employer units where workers are numbered in tens or hundreds instead of individuals, one worker is usually possessed of little bargaining power. Unions have been developed, in part at least, to re-equalize this bargaining situation. Obviously, the more nearly equal the bargaining power of the parties the more reasonable the settlement that will be reached. If either party has power completely disproportionate to that of the other, the resultant agreement probably will not be adequate. Therefore, the development of a situation in which either party has a distinct advantage over the other is undesirable. For many years such a situation developed, almost invariably with management holding the upper hand. Recently this situation has not been so universally true.

If the preceding analysis is reasonable, the rulings of the courts in applying the anti-trust laws were not economically defensible in many cases. Every one of the key decisions noted was such as to limit in one way or another the logical action of a union attempting to enforce its demands. The violence of the dispute in the Colorado case certainly could not be condoned, although the actions of the company encouraged the outbreak of violence. However,

holding that disruption of interstate commerce during a strike puts the union in violation of the anti-trust laws is indeed a severe restriction of the actions of organized labor. There is no way of successfully prosecuting a strike in a large plant shipping goods in interstate commerce without interfering with the flow of goods. The very purpose of a strike is to prevent the production of goods; if this be successful, sooner or later a curtailment of shipment must follow.

Similarly, the doctrines laid down in the Duplex and Bedford cases are difficult to defend from the viewpoint of those who believe in the desirability of organized labor. There are many instances when a labor dispute of necessity extends far beyond an employer and his own workers. Whether or not a certain employer recognizes and deals with a certain union is of importance to many members of the union far removed from the source of the original dispute. Therefore, there are many instances when a union needs to push its action in many areas and by various means. The long-standing custom among union members of using or working on union-made goods and refusing to work on others is a manifestation of this broadened activity of unions and of the development of a belief among many union leaders that worker interests are much broader than their own wages, hours, and working conditions.

But under the Duplex and Bedford rulings, refusal of union members to work on goods that they consider to have been produced under conditions unfair to their interests was held to be a violation of the anti-trust laws. As is the case with an effective strike, refusal by large numbers of persons, union men or others, to purchase or work with non-union-made goods must of necessity reflect itself in the shipments of goods in interstate commerce. But the effect is incidental to the action taken; it is not possible for union men to support other union members through a boycott without some incidental effect on commerce.

There is no reason to assume that any large portion of Congress, in either 1890 or 1914, meant to hamstring organized labor completely. But in the modern capitalistic society in which we live and work, strict application of the doctrine laid down in the cases just reviewed would have that effect. Clearly, a union cannot do an effective job of bargaining without in some instances extending its activities to workers and areas not directly affected. Therefore, whatever the incidental effects of union actions, an assumption that *bona fide* unions have a right to exist and effectively to bargain must offer a basis for allowing a great degree of freedom of action short, of course, of violence and unlawful activity.

There is still another reason for taking the position that organized labor was unduly restricted prior to 1930 by the anti-trust laws. Justice Brandeis pointed out in his dissent in the *Bedford Stone* case that the anti-trust laws prohibited only unreasonable restraints of trade. Since the meaning of "unreasonable" is not precise, there is much reason to believe that the same measuring rod was not used in all cases in determining unreasonable restraints by labor and by capital. As Justice Brandeis stated in a passage quoted earlier in this chapter, capital combinations allowing control of 50 per cent or more of the capacity of certain industries were tolerated as non-violations of the anti-trust laws. Comparison of the circumstances of some of the court decisions applied to organized labor with some of the capital combinations permitted certainly indicates that a dual standard of behavior existed—one for labor and one for capital.

Thus, on a number of grounds, the move of organized labor and its sympathizers to bring about revision of the anti-trust laws in their application to union activities was justifiable. The drive was successful on two issues; a few years later there was revision of the power of the federal courts to issue injunctions that limited the ability of the courts to grant injunctive relief on the grounds that certain activities were a violation of the anti-trust laws. Further, the courts showed a willingness in later decisions to recognize that some interference with commerce was fundamental to much labor activity, but that if it was incidental to the activity rather than the purpose of it, court attitude should be different. An examination of these developments must be postponed to subsequent chapters.<sup>33</sup>

### Questions

1. With a very literal interpretation of every contract or combination in restraint of trade, how much and what types of American business could have been prohibited under the Sherman Act?
2. To what extent and how did the "rule of reason" of the Supreme Court modify the effects of the Sherman Act?
3. The success of damage suits in the *Loewe* and *Coronado* cases did not result in many such suits. What reasons are there for the relatively few instances in which employers have sought damages from workers or unions?
4. What reasons can you suggest for the failure of Samuel Gompers, then President of the A. F. of L., to judge more realistically the meaning of the passage of the Clayton Act?
5. How do you explain the ability of judges considering a case on the

<sup>33</sup> See below, Chs. XV, XVI, and XVII.

basis of a certain set of facts after hearing the same arguments pro and con to arrive at diametrically opposed opinions?

6. What were the specific cases and rulings on the anti-trust laws that caused unions to launch, in the late 1920's, a drive for revision? On what specific points did unions especially want relief?

## CHAPTER VIII

### OTHER LABOR CONTROLS UP TO THE FIRST WORLD WAR

#### Early protective labor legislation

During the same period in which organized labor was feeling the restrictive application of the anti-trust laws, the nation witnessed the first experiments with protective labor laws. Prior to the entry of the United States into the war in April, 1917, the first laws regulating child labor, and hours of work and wages for women and children had been enacted. In addition, beginnings had been made in providing workmen's compensation for accidents and in establishing public employment agencies. Despite the crudity, measured by the standards of today, of these early laws, they were important experiments that merit considerable study.

The great majority of the legislation affecting labor problems and labor relations prior to the war were state laws, the only federal controls coming from court injunctions and applications of the Sherman Act, already noted, and from labor controls for railroad workers. It will be seen that most of the early social and labor legislation originated in the northeastern states. In fact, throughout our history those states have been among the leaders in the enactment of progressive laws, an occasional enactment to the contrary notwithstanding.

That state governments would pioneer in passing labor laws and social protection laws is understandable. As already noted, the police power of the states has been interpreted so as to validate such laws. Only in recent years has the federal government been construed to have authority to regulate wages, hours, and working conditions and to extend social protections to selected groups. Before this change in interpretation of powers such legislation had to come from the states; as a result, they were, in a sense, laboratories in which legislative experiments have been tried.

The responsibility of the eastern and northeastern states for much of this experimentation arose from the fact that this area was the first to industrialize. The frontier moved westward and a mixed economy of agriculture, foreign and domestic commerce, and manufacturing began to develop. With industrialization came the growth

of labor problems more complex than those of an agricultural society. Among these problems were industrial health and safety, employment of women and children on mechanized jobs, and the development of a wage-labor class more completely dependent on the employer than ever before. Where there was an earlier appearance of labor and social problems, earlier enactment of laws aimed at solution of these problems was to be expected.

The political and social attitudes in these states probably also were more congenial toward protective legislation than in many parts of the country. Compared with some parts of the nation, the Northeast had a more democratic spirit. In other areas industrialization came later than in the East, and most of the states retained a preponderance of agricultural enterprise and predominantly agricultural representation in state legislatures. This preponderance of farming tended to foster an individualistic philosophy that is rarely conducive to a pro-labor point of view. Although at times agricultural states, especially Wisconsin, have led in the passage of social legislation, they have quite generally been somewhat slower in this respect than has the East. West coast states, once settled and having developed considerable industrialization, tended to be in the forefront in the enactment of progressive legislation. Although much younger than the eastern seaboard states, their progressiveness is comparable to the older area.

### Early child labor laws

The general subject with which protective labor legislation was first concerned was child labor. The basis for this was twofold: first, the states are the guardians of the minors in their area, and second, there was a particularly evident relationship between the general welfare and the work of children, and therefore more reason for exercising police power.<sup>1</sup> In a sense, guardianship is but a part of the police power reserved to the states.

There were two general lines along which child labor legislation developed in the states. One approach was through the prohibition of child labor, below certain ages, in certain occupations, or at certain times of day. The other general approach was through the regulation of working conditions, such as hours of work, conditions of the job, educational opportunities required to be provided, and the like. The two types of control grew concurrently, regulation of hours of work beginning slightly earlier.<sup>2</sup>

Regulatory laws were first enacted in 1842 when Massachusetts

<sup>1</sup> Commons, J., and Andrews, J., *op. cit.*, p. 512.

<sup>2</sup> Laws concerning school attendance have an effect on child labor. However, they are not, strictly speaking, child labor laws and are not discussed here.

and Connecticut passed bills that established ten-hour work days for children.<sup>3</sup> The Massachusetts law applied to children under twelve years of age in manufacturing while the Connecticut law applied to those under fourteen in cotton and woolen mills. Before the outbreak of the Civil War, five other states had laws establishing ten-hour maximum work days for children.<sup>4</sup> These laws were applicable in some states to children in manufacturing and in others to those in textile mills; in none was there general applicability to child labor in all occupations, and some had loopholes that allowed longer hours with the consent of the guardian or parent or when the extra work was done voluntarily. In addition, most of the laws lacked provisions for enforcement. However, despite the weaknesses, the regulation of hours of work spread, the ten-hour day gradually being supplanted after 1903 by the eight-hour day, first established in that year by Illinois.

Meanwhile, the movement to prohibit employment of children in certain occupations began to develop. Pennsylvania set the precedent for this type of control with a law enacted in 1848 prohibiting the employment in textile mills of children under twelve. New Jersey, Rhode Island, and Connecticut followed suit in prohibitions against the work of children below certain ages in manufacturing. After the Civil War, such legislation had the backing of the Knights of Labor and, later, the American Federation of Labor.<sup>5</sup> Civic groups joined in urging child labor controls to prevent employment in industries that were considered harmful. As a result, all states but six had prohibitory laws of some sort in 1909. However, the laws varied widely in applicability and in provisions.

With the wide variations in the laws, the move to improve legislative regulations of child labor was faced with serious difficulty. As shown above, the northeastern states initiated regulations of child labor and gradually expanded and improved them. But these relatively satisfactory laws were nullified to a considerable extent by the failure of other states to keep pace with the trend. As a result, employment of child labor was spotty, with some states having much larger percentages than others. In terms of the total number of children and the percentage of children employed, the situation grew progressively worse until 1910. By that year, almost 2,000,000 boys and girls from age ten to fifteen years, nearly 18½ per cent of the children of that age, were at work.

<sup>3</sup> This was not the first law having direct effect on the employment of child labor. As early as 1813, Connecticut enacted a law requiring that child factory workers receive instruction in reading, writing, and arithmetic.

<sup>4</sup> New Hampshire, Maine, Pennsylvania, New Jersey, and Ohio. See: Commons, J., and Andrews, J., *op. cit.* (1920 edition), p. 227.

<sup>5</sup> Millis, H. A., and Montgomery, R. E., *op. cit.*, Vol. I, p. 434.



Under these conditions, it was small wonder that interested persons began to lose faith in the efficacy of state controls. Therefore, the move for federal control began to grow; the first proposal in Congress for a federal law came in 1906, but this particular bill was not well-supported. Prior to the war, however, both political parties had endorsed the principle of federal control, and in 1916 such a law was passed. This attempt was not to replace but rather to supplement state laws by regulating the labor of children on goods shipped in interstate commerce. An examination of the law and its treatment before the courts will be made in a later chapter.<sup>6</sup>

#### Regulation of hours: women

Although regulation of the work time of children was not seriously questioned, as far as power of the states was concerned, the regulation of the hours of work of adult men and women was not so simple. The control of the hours of women probably is more closely related to child labor controls than is that of men. Frequently, women and children are grouped together in the same laws. The theory of guardianship cannot be used in justification of protection for women, however, and because they are adults questions of class legislation and impairment of freedom of contract may be raised. It is clear that women generally are less able to care for themselves economically than men. Before the first World War they tended, certainly, to be weaker bargainers; relatively few were members of unions, and the proportion in jobs requiring considerable degrees of skill was smaller than at later dates. In addition, they were likely to find themselves barred from many types of work that were more desirable and might have given them more bargaining power.

The need for legislation to protect working women was recognized almost as early as was the case for children. Pressures seeking to promote protective laws for both groups began at about the same time. New Hampshire, in 1847, enacted a ten-hour law for women, and was followed by Maine and Pennsylvania in 1848 and New Jersey and Rhode Island in 1851, but these laws were ineffective and full of loopholes.<sup>7</sup> It was not until the Massachusetts law of 1879 that effective regulation of hours of work for women began. Although this law was upheld by the state Supreme Court, it was not long before doubt again was encountered as to the validity of such laws. The question was raised in a decision of the Illinois Supreme Court. This decision, *Ritchie v. People*,<sup>8</sup> concerned the validity of

<sup>6</sup> See below, Ch. XIII.

<sup>7</sup> Millis, H. A., and Montgomery, R. E., *op. cit.*, Vol. I, p. 527.

<sup>8</sup> 155 Illinois 98 (1895).

an eight-hour-day for women. In its decision invalidating the law the Court relied on the standard logic that has been used so frequently in such cases. As the Court saw it, sex was no bar to a woman exercising "fundamental and inalienable rights of liberty and property, which include the right to make her own contracts." The only basis for restriction of such rights was some "reasonable connection between such limitation and the public health, safety, or welfare." In the opinion of the Court, such relationship did not exist, and, therefore, police power was not properly used in the abridgement of individual rights.

While the Ritchie decision was enough to dampen the enthusiasm of those who wished such legislation, it was not a definitive ruling applicable to the entire nation. There was need for an opinion by the federal Supreme Court that would settle the question of whether the police power of the state was an adequate basis for maximum-hours laws for women. This decision came thirteen years later in an opinion on the validity of a law that Oregon had passed in 1903 prohibiting more than ten hours of work per day for women "employed in any mechanical establishment, or factory, or laundry."<sup>9</sup> Violations were made misdemeanors punishable by nominal fines of \$10 to \$25. A laundry owner was accused in 1905 of having violated the act. He lost the decision in the lower state court and in the state Supreme Court, and appealed the case to the federal Supreme Court. The case, as decided by the Supreme Court, is significant for two reasons: Louis D. Brandeis'<sup>10</sup> "socio-economic" brief for the state was a sharp and capable departure from the traditional method of presenting cases, and the Supreme Court ruling on the issue was equally important as a means of clearing the way for expansion of such state legislation.

The case, *Muller v. Oregon*,<sup>11</sup> was appealed to the federal Court with the counsel for the plaintiff arguing that the law was invalid on three counts: (1) it prevented persons covered by the law from making their own contracts, thus depriving them of a liberty guaranteed under the fourteenth amendment; (2) it did not apply equally to all persons similarly situated, covering women in specified occupations only, and thus violated the equal protection of the law clause of the fourteenth amendment; and (3) it was not a valid exercise of the police power because there was no clear and reasonable relationship between the prohibition of the act and public health and safety.

<sup>9</sup> Session Laws 1903, p. 148.

<sup>10</sup> At this time Mr. Brandeis was a practicing lawyer; after a brilliant career as a lawyer, he was appointed to the Supreme Court in 1916 where he served until retirement in 1939.

<sup>11</sup> 208 U. S. 412 (1908).

Mr. Brandeis countered this legal argument with a brief containing statistics, findings, and opinions from some ninety studies and reports made by various commissions, committees, and bureaus in this country and abroad. In addition, he cited laws in nineteen of the United States and in seven foreign countries. The essence of his brief was that long hours of work were especially dangerous for women because of their special physical structure and function. Some such approach probably was essential, since three years previously the Court had ruled invalid a New York law that set a ten-hour day for bakery workers.<sup>12</sup> Brandeis' brief stressed the point that physical differences in men and women made it imperative that women be extended protection against long hours of work.

The Supreme Court was impressed with the brief; reference was made in the Court opinion to the material used and the manner in which it was presented. It admitted somewhat sheepishly that the data presented "may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant. . . ." Indeed, these facts were significant, for the judge's ruling in this case turned largely on whether women were more in need than men of protective legislation. Since "healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race." With this avowed purpose, the final question to be determined was whether an unimpeded exercise of her constitutional rights was sufficient therefor. In the opinion of the Court, this was not the case: differences between men and women were such that "she will still be where some legislation to protect her seems necessary . . . she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men." Thus the Oregon law was upheld, in good part on the basis of physical inequalities but to some extent on the implied recognition of differences of the bargaining abilities of men and women.

Shortly after the Muller decision, the Illinois Supreme Court reversed its 1895 decision in *Ritchie v. People*, admitting that it was necessary to consider matters other than legal technicalities in their opinions.<sup>13</sup> In 1915, the federal Supreme Court applied the principle of the Muller decision to a California law fixing an eight-hour work day for women.<sup>14</sup> Before the first World War, therefore, it was established that the police power of the state was an adequate

<sup>12</sup> *Lochner v. New York*, discussed later in this chapter.

<sup>13</sup> *Ritchie v. Wayman*, 244 Illinois 509 (1910).

<sup>14</sup> *Miller v. Wilson*, 236 U. S. 373 (1915).

basis for limiting the maximum hours of work for women. Although some states have not taken adequate advantage of this ruling, it will be seen that most of them have enacted some such laws, with varying degrees of strictness.

#### Regulation of hours: men

Questions concerning the validity of laws regulating the hours of work of men came to the courts at about the same time as those pertaining to women. Early regulations for men sought to establish maximum hours in those industries that were hazardous. The first case that came to the federal Supreme Court on this type of law was *Holden v. Hardy*,<sup>15</sup> a case arising in the state of Utah. The Utah legislature had enacted, in 1896, a law to regulate the hours of work in underground mines and in smelters and ore-reduction works. In these places of employment, an eight-hour day was set as the maximum, except in emergencies when life or property were in danger. Shortly after the passage of the act, a complaint was made that Holden had employed workmen for ten hours daily in an underground mine. After an adverse opinion before a lower court and the Utah Supreme Court, Holden appealed the case to the federal Supreme Court, contending that the law under which he was convicted and sentenced was repugnant to the Constitution of the United States.

It was urged that the law violated the Constitution on at least three counts: (1) it deprived workers and employers of their right to make contracts freely; (2) the law was not equally applicable to all persons, that is, it was class legislation; and (3) it deprived persons of property without due process of law. It was argued in defense of the law that it was a valid exercise of the police power; since mining and smelting are hazardous occupations, working conditions in these occupations are a matter of public welfare; the state legislature recognized these facts when it passed the law in question.

The court prefaced its analysis of the case with a comment that "the law is, to a certain extent, a progressive science"; being such, legal or judicial principles that were at one time established and accepted may at some other time no longer be in keeping with or may inadequately meet the needs of the time. Admitting that state legislatures have the power to protect the lives of their citizens, the Court progressed in its reasoning to the conclusion that they could legislate to protect health and morals because "it is as much for the interest of the state that the public health should be pre-

<sup>15</sup> 169 U. S. 366 (1898).

served as that life should be made secure." Since employment in smelters and underground mines for excessively long periods was held by the Utah legislature to be detrimental to health, the regulation was held valid. Just how low the hours of work could have been set, that is, whether they could have been set lower than eight per day, was not considered. Since the legislature named eight as a reasonable limit, it was accepted by the courts, state and federal. The Court was careful to point out, however, that this sanction of the law in question was not a sanction of all laws limiting the hours of work. This was approved on the basis that it was necessary as a protection of health in industries where excessive hours of work would be detrimental. The decision was important and desirable but far from definitive, and questions of when an occupation is hazardous and what hours are reasonable were still very much alive.

A comment made by the Court in the Holden case is worth noting, more for its general philosophy than for its effect on the case. The Court noted, with implied agreement, that in passing the eight-hour law the state legislature had:

"recognized the fact . . . that the proprietors of . . . establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employees, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental. . . . In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority."

That statement is as sound and pointed an argument for either unions<sup>16</sup> or governmental interference in labor problems as could be found today, and it was written a half-century ago. Although the Court did not use this reasoning in its decision, it put its finger on the most sound of all criticisms of the application of competitive economic theory to labor-management relations; namely: the fact that employers and unorganized workers often do not have equal bargaining power. If employers and employees had equal power to bargain for their wages and conditions of work, there would be no

<sup>16</sup> Although the position is taken in this volume that labor unions are needed to equalize economic power, it must be noted that not every union action can be justified in such a manner. In some instances, a strong union and a small or financially weak employer may present a reversal of the imbalance in bargaining power. The fact that there are occasions of irresponsible or unwise action by unions does not detract from the general need for worker organizations to enhance the bargaining stature of individual workers through coordinated action.

sound reason for unions to enhance the workers' bargaining power or for action by the government to ensure reasonably just settlement of points at issue.

The *Holden v. Hardy* decision was a landmark, but it was not emulated in many subsequent cases, and the applicability of the ruling was rather narrow. It will be remembered that the Court was emphatic in pointing out that they were not examining the applicability of such laws to all workers. Indication of the uncertainty that was to exist came seven years later in the federal Supreme Court decision on a New York law establishing a ten-hour maximum day for bakery workers. The decision in *Lochner v. New York*<sup>17</sup> centered on the question of whether the law was an appropriate exercise of police power or an arbitrary interference with the rights of individuals. With no specific definition of what is or is not arbitrary and what may or may not be reasonable restraint by the state, the justices failed to see eye to eye on the issues involved; by a five-to-four decision the law was held invalid. The majority held that bakery workers were not wards of the state but were equally able with others to take care of themselves, and that matters of public health, safety, and morals were not involved. Since, as five members of the Court saw it, "the trade of a baker . . . is not an unhealthy one," the law "reached and passed" the limit of the police power. The majority was fearful that there would be almost no limit to the prohibition by law of personal liberties if the law in question were approved.

A dissent by three justices, following much of the reasoning used in the *Holden* case, was to no avail. These three argued that since the New York legislature had been of the opinion that there was a reasonable relationship between the working of long hours in bakeries and the general welfare, the Court should not hold otherwise. However, the brief dissent of Mr. Justice Holmes pointed clearly to the real reason for the overthrow of the law. The comment that "this case is decided upon an economic theory which a large part of the country does not entertain" cuts to the heart of the matter. Although Mr. Justice Holmes did not mention it by name, the unreal theory that in our economy justice is done by allowing the parties to the employment contract to battle out their disagreements even though bargaining power may be unequally divided, was the basis of the *Lochner* majority opinion.

Thus, prior to World War I, the principle had been established that states could regulate the hours of work of non-governmental

<sup>17</sup> 198 U. S. 45 (1905).

employees engaged in hazardous industry. Also prior to the war, the federal Court had ruled that Congress had the power, under its interstate commerce authority, to set maximum hours for railroad workers because of the relationship between hours of work and public safety.<sup>18</sup> Another court ruling on hours was of less interest but worth noting. In 1903, the eight-hour law of Kansas for state and municipal employees and for employees of private employers working under contract to the state or any of its subdivisions was upheld.<sup>19</sup>

There is another type of legislation that is in part a regulation of hours and in part a wage measure. This type of control comes about when a basic work day or week is established and longer hours are prohibited unless extra pay is given for the work time in excess of the basic time allowed. It will be shown later that the current Fair Labor Standards Act is such a law; it sets 40 hours per week, but allows any amount of extra time if penalty rates of not less than time-and-a-half are paid for all time over the 40 hours. Such a law first came before the federal Supreme Court in 1917.<sup>20</sup>

The case of *Bunting v. Oregon* was a test of the validity of an Oregon law providing a ten-hour day for workers in mills, factories, and manufacturing establishments. However, a work day of 13 hours could be used if the hours above ten daily were paid for at not less than time-and-a-half. In a sense, therefore, the law was a thirteen-hour law. The penalty for the last three hours of work was intended, however, to discourage work beyond ten hours. The federal Court followed the state Supreme Court in accepting the statement in the law which declared that it was intended to prevent injury to health from excessive hours of work. The Court denied the contention that the law was one that attempted to fix wages.

The wording of the opinion, a five-to-three ruling with Mr. Justice Brandeis not participating, was such as to imply general sanction of maximum-hours laws for both men and women. The Court commented that it need not concern itself with the reasons for or wisdom of the ruling. "It is enough for our decision if the legislation . . . was passed in the exercise of an admitted power of government . . . our judgment of it is that it does not transcend constitutional limits." Although this was not a straight maximum-hours law, the decision gave added weight to the proposition that even before World War I the police power could be used for the regulation of hours in most employments.

<sup>18</sup> *Baltimore and Ohio Railroad Co. v. Interstate Commerce Commission*, 221 U. S. 612 (1911).

<sup>19</sup> *Atkin v. Kansas*, 191 U. S. 207 (1903).

<sup>20</sup> *Bunting v. Oregon*, 243 U. S. 426 (1917).

### Laws regulating wages

The wages paid to workers are without question the most highly publicized source of conflict between labor and management. Despite the contention of many persons in recent years that psychological and other non-monetary matters are more important, the fact is undeniable that much difficulty arises over the question of wages. For many years, beginning before the turn of the century, legislatures and the courts have stepped into the wage relationship from time to time. The federal Supreme Court had approved state laws regulating the computation of miners' wages<sup>21</sup> and the medium in which wages could be paid<sup>22</sup> prior to the first World War. In addition, state courts and lower federal courts had approved laws such as those granting priority liens to wages in case of business liquidation and others regulating the time of wage payments.

Such legislation and rulings, while desirable, did not go to the bottom of the wage controversy. The most difficult problem was that of whether minima should be set for wages paid to private employees. This question was, up to the first war, one for state action, considered with respect to women and children only; the federal Congress made no attempt at minimum-wage control up to that time, and the eleven state laws that were enacted all ignored male workers. But low wages among women workers were so prevalent, owing, in part at least, to employment in less skilled work, less frequent union membership, and to the tradition of paying low wages, that demands for government action began before 1900 and the chorus swelled rapidly.<sup>23</sup> Increased interest and information on the subject finally brought action, beginning with Massachusetts in 1912. Its example was followed by ten other states in the next three years.<sup>24</sup> Some of the laws were not enforced and others were poorly drawn, as is usually the case with pioneering legislation.

Naturally, laws that broke so sharply with the tradition of individualism would not be allowed to go unchallenged. The first test case in this field of regulation came to the federal Court in 1917.<sup>25</sup> However, Louis D. Brandeis, who had just been appointed to the supreme tribunal, had prepared the brief used by the state of Oregon in the case. Since he could not properly participate in the decision, eight justices considered the case and divided evenly; no decisions were written and the opinion of the Oregon Supreme

<sup>21</sup> *McLean v. Arkansas*, 211 U. S. 539 (1909).

<sup>22</sup> *Keokee Consolidated Coke Co. v. Taylor*, 234 U. S. 224 (1914).

<sup>23</sup> Millis, H. A., and Montgomery, R. E., *op. cit.*, Vol. I, p. 305.

<sup>24</sup> California, Colorado, Minnesota, Nebraska, Oregon, Utah, Wisconsin, and Washington in 1913 and Arkansas and Kansas in 1915.

<sup>25</sup> *Stettler v. O'Hara*, 243 U. S. 629 (1917).



Court stood. In that decision<sup>26</sup> Brandeis' argument showed through the reasoning of the Court clearly. The decision centered on the fact that the physical structure and function of women was such as to make protective legislation for them of importance to public health, morals, and welfare.

Thus, at the time of the first World War, the minimum-wage movement was skating on extremely thin ice. Only a dozen states had taken the step and some of the laws were very poor. Some established statutory minima while others provided for the establishment of commissions that were to study the situation and set wages; during the earlier years most of the commissions were instructed to set wages that would be sufficient to support the working woman in "health" and "decency," or whatever similar terms might be chosen. Later laws included provisions for setting minima commensurate with the value of the services rendered.<sup>27</sup> With the small number of laws and their weakness in structure, administration, and enforcement, there was yet another problem faced by the proponents of minimum-wage legislation. There was no clear indication of the attitude of the federal Supreme Court on such laws; the even split of the justices on the Stettler case simply postponed the day when a definite ruling would be made. That ruling was not to come until well after the close of the war.

### The right to organize

We have noted earlier in this study the unfriendly attitude of the courts toward labor organization. The fact that the *Commonwealth v. Hunt* decision of 1842 recognized labor's right to organize did not mean that the road ahead was clear. Prior to 1914, only a few states recognized in statutes the right of workers to organize<sup>28</sup> and the laws that were enacted were of little consequence. Both state and federal courts were busy handing down injunctions in labor disputes, and, at the same time, federal courts were issuing restrictive rulings based on the power of the federal government over interstate commerce.

Before the outbreak of the war, however, federal and some state governments had endeavored to ensure that workers actually were accorded a right to belong to a union if they so desired. As will be seen, these attempts were not successful. Congress made its first attempt in 1898 in the Erdman Act.<sup>29</sup> This act dealt, primarily, with

<sup>26</sup> *Stettler v. O'Hara*, 69 Ore. 519 (1914).

<sup>27</sup> This was in an unsuccessful attempt to circumvent a ruling of the Supreme Court holding invalid minimum-wage laws based on cost of living. See below, Ch. XIV.

<sup>28</sup> Fourteen states, generally the more industrialized ones; see Millis, H. A., and Montgomery, R. E., *op. cit.*, Vol. III, p. 509.

<sup>29</sup> 30 Stat. at L. 424.

means of settling disputes between labor and management of the railroads. One section was devoted to yellow-dog contracts. It provided, in part, that any employer subject to the act might be fined from one hundred to one thousand dollars for requiring "any employee, or any person seeking employment, as a condition of such employment, to enter into an agreement, either written or verbal, not to become or remain a member of any labor corporation, association, or organization."<sup>30</sup> Furthermore, the employer could not threaten dismissal because of union membership or discriminate against workers for that reason. This section did not in any way require membership in a union but sought, for railroad workers, to remove the ability of the employer to make non-membership a requirement of employment.

Section 10 of the Erdman Act was tested before the federal Supreme Court in 1908.<sup>31</sup> The question involved was whether employers on the railroads had a legal right, protected by the fifth amendment, to dismiss a workman because of union membership. In its opinion, the majority of the Court forgot completely the opinion in the *Holden v. Hardy* case when the majority had commented so clearly on the inequality of bargaining power of employers and workers. Speaking for the majority, Mr. Justice Harlan held that the employer had a legal right to fire and the workers to refuse to work for whatever reason they chose. "In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with liberty of contract." Thus, the restriction of Section 10 was held to be in violation of the fifth amendment. And, in addition, the Court opined that Congress had stretched the power over interstate commerce too far, since "there is no such connection between interstate commerce and membership in a labor organization as to authorize Congress to make it a crime . . . for an agent of an interstate carrier to discharge an employee because of membership."

This reasoning was not convincing to Mr. Justice Holmes. In his dissent he pointed out that "the ground on which this particular law is held bad is not so much that it deals with matters remote from commerce among the States, as that it interferes with the paramount individual rights secured by the Fifth Amendment. The section is, in substance, a very limited interference with freedom of contract. . . . It does not compel the carriers to employ any one . . . . The section simply prohibits the more powerful party to exact certain undertakings . . . or unjustly discriminate. . . ." Here

<sup>30</sup> *Ibid.*, Section 10.

<sup>31</sup> *Adair v. U. S.*, 208 U. S. 161 (1908).

was the essence of the Holden philosophy so conveniently forgotten by the majority.

Both state and federal anti-yellow-dog-contract laws were overthrown by the courts. Although a federal court test of the state laws did not come until 1915, state courts had in a number of cases before the turn of the century held the yellow-dog agreements invalid.<sup>32</sup> The federal Supreme Court case came up over the law enacted in Kansas in 1903. The law was similar, except for its coverage, to Section 10 of the Erdman Act. For employers in Kansas it prohibited the requirement of a yellow-dog agreement as a condition of employment. One employer who discharged a worker because he refused to withdraw from a union was brought before the Court. The Kansas Supreme Court upheld the law and the case was appealed. The federal Supreme Court ruled on it in the case of *Coppage v. Kansas*.<sup>33</sup>

The Court showed its position on the case at the outset when it stated that the case was not distinguishable from the Adair case and that unless the latter ruling was to be overthrown, the case in question could not be upheld. This ruling also was based on the assumption of an equality of economic power and freedom of both parties to the contract of employment. Once that assumption is made, and it could be made only by a person not familiar with the facts of industrial relations, there was just one logical conclusion to be drawn; the fourteenth amendment could not be used as a basis for restricting the liberty of either party so long as the equality would prevent one party from dictating terms to another.

Mr. Justice Holmes again was not convinced. In his dissent he pointed out that "in present conditions a workman not unnaturally may believe that only by belonging to a union can he secure a contract that shall be fair to him. . . . If that belief . . . may be held by a reasonable man, it seems to me that it may be enforced by law in order to establish the equality of position . . . in which liberty of contract begins." Justice Holmes insisted he was not passing on whether or not it was wise to enact the legislation; as far as the Constitution was concerned, there was nothing therein to prevent it, and the Court should not prohibit the enactment. However, considerable time was to elapse before the view of Justice Holmes was to prevail.

#### The beginnings of workmen's compensation

Legislation to give some assistance to persons, or their dependents, who were injured by industrial accidents was reasonably well-

<sup>32</sup> Such was the case with the laws of Missouri (1895), Illinois (1900), and New York (1906). See Millis, H. A., and Montgomery, R. E., *op. cit.*, Vol. III, p. 510.

<sup>33</sup> 236 U. S. 1 (1915).

established prior to the first World War, and merits our attention in this chapter. By 1900 or 1910 in the United States, the problem of industrial accidents was a serious one. The Bureau of Labor Statistics stated, in 1913, that the number of fatal accidents in industry was "conservatively estimated at 25,000 for the year," and that the number causing more than four weeks lost time was 700,000.<sup>34</sup> According to the report, over three-fourths of the accidents in the iron and steel industry resulted in disability of less than four weeks. On that basis, the figure of 700,000 that was estimated for nationwide fatalities and disabilities of over four weeks would represent only one-fourth of the industrial accidents resulting in lost time during the year. While the suffering and sorrow that result from industrial, or any other, accidents present a serious problem, the economic problem of industrial accidents is a different but equally serious one. The accident brings a loss of productive power just as would a layoff or a strike. In addition, the accident is a cost of production that must be borne by some persons or groups in our society, presumably by the producers or purchasers of the goods.

When a person is injured so that he cannot work, he and his family are without an income at the time when greater expenditures are required. In case of death of the wage earner, the family is usually left without an income; at best, it is a rare instance when the family has sufficient income to meet essential expenses alone and without severe hardship. Fatal accidents were especially distressing because dependent children were left by the great majority of deceased workers, nearly two-thirds of whom were the sole support of the family.<sup>35</sup>

Prior to the enactment of workmen's compensation laws by the states, an injured workman, or the family of one that had suffered a fatal accident, had little chance of receiving a satisfactory monetary settlement from the employer. For example, according to a study of the compensation awarded the families of 235 workers killed in industrial accidents in 1907 and 1908 in Pittsburgh, over one-fourth received less than one hundred dollars and about one-eighth received more than \$2000.<sup>36</sup> Inadequate settlements meant prompt resort to charity or relatives by many of the families.

The reason for these niggardly settlements was that the worker or his family either took the compensation that the employer offered or else had to sue for damages. Settlements offered were rarely

<sup>34</sup> U. S. Bureau of Labor Statistics, Bulletin No. 157, *Industrial Accident Statistics*, p. 6. Washington, D. C.: U. S. Government Printing Office, 1915.

<sup>35</sup> Millis, H. A., and Montgomery, R. E., *op. cit.*, Vol. II, p. 189.

<sup>36</sup> *Ibid.* Perhaps more striking testimony to the inadequacy of compensation without legislative enforcement is reported on pages 192-193 in the Wisconsin and Minnesota studies.

munificent and the attempt of a worker or family to sue ran up against the ability of most employers to hire excellent legal brains to argue their cases. Workers could not afford to retain expensive lawyers, or, if they did, their compensation was largely absorbed by lawyer fees. In addition, there were three common law principles that could be used quite effectively by employer counsels to combat the claims of the workmen.<sup>37</sup>

The basic assumption of the employer's common law defenses was that in industry a considerable amount of occupational risk was inevitable. A worker was considered as assuming these normal risks of the job if the employer had used reasonable care in providing for the safety of his employees. If the employer had been reasonably careful, there were three doctrines or defenses available: (1) the fellow servant rule, (2) the contributory negligence doctrine, and (3) the assumption of risk doctrine.<sup>38</sup>

The fellow servant rule, which excused the employer from damages in many instances, was, simply stated, that if a fellow workman's negligence was the cause of an injury, the employer might not be held liable. It is interesting to note that Chief Justice Shaw of the Supreme Court of Massachusetts popularized this doctrine, which had already been used in England and in this country but was not widely known, in 1842. That was the year in which he rendered the famous *Commonwealth v. Hunt* decision holding that unions, even when demanding a union shop, were lawful organizations. Thus, in the same year Justice Shaw gave workers assistance in their struggle to organize and bargain collectively and called attention to a doctrine that was to be very effective as a means of combatting suits for damages for injured workmen, at a time when such suits were the only means of forcing any settlement.

The doctrine of contributory negligence held that if an injured workman was guilty of negligence that in any way contributed to causing the injury, the employer could not be held liable. Thus, if a man used tools or machines imprudently or continued to work under conditions that apparently were dangerous, his case probably was lost. The negligence of the workman cancelled negligence on the part of the employer. Cases using this doctrine appeared in England as early as 1809 and in this country in 1866.

Finally, there was the doctrine of assumption of risk. If it could be proven that the injured workman knew of the condition that gave rise to his injury and worked irrespective of this knowledge, it could be argued that he knowingly assumed the risk. And if he assumed the risk he had no valid claim on the employer.

<sup>37</sup> See Ch. III.

<sup>38</sup> Armstrong, B. N., *op. cit.*, pp. 190-193. See also: Commons, J., and Andrews, J., *op. cit.*, pp. 228-232.

With these legal loopholes available, clever lawyers could in most cases find a way of escaping payment of a monetary settlement of accident claims. In many instances the employer did not have to fight the case with his own lawyers; if an employer carried liability insurance with some company, the insurance firm would provide lawyers skilled in fighting such cases. There were a number of criticisms of the principles outlined earlier; they were unrealistic on a number of counts. For example, the fellow servant defense would permit a man to be disqualified for an award because of the actions of some fellow workman whom he could in no way select. The fellow workmen were hired by the employer; those who did not want to work with them could leave the job, but with many instances when jobs were scarce this right was a theoretical one. Similarly with the assumption of risk; even if a man recognized the danger of a job, economic necessity might well force him to continue on it despite his better judgment. Finally, when the means of securing a settlement was through legal action and the worker had little money with which to get a good lawyer, there was little reason to think in terms of equality before the law.

Small wonder, then, that many injured workmen did not even bring suit for damages. And small wonder, also, that the latter part of the nineteenth century saw the development of a drive for modification of the employer liability loopholes. Thus, beginning in 1885 with the state of Alabama, various states and the federal Congress began to enact laws modifying and restricting the manner and extent of utilization of the common law defenses. These laws varied in their provisions and in the degree of restriction imposed; the federal law enacted in 1908 to modify the escape clauses used by railroad employers may be noted as an example. By this act<sup>39</sup> the carrier was made liable for injury or death due in whole or in part to negligence of any of its employees—from officers to other workers—or to defects in material. Contributory negligence of the worker could not be used to escape payment in a damage suit, although damages might be decreased for this reason. The employee could not be held to have assumed the risk where company violation of safety statutes caused the accident.

Although employers' liability laws were a step forward, they still were not an adequate solution to the problem of compensation for industrial accidents. The injured workmen or their dependents still were required to sue for damages. There was in this country, up to 1910, no legal assumption that the cost of human injury should be a part of the cost of production, just as was the cost of repairing a machine. Meanwhile, the nations of northwestern Europe had

<sup>39</sup> 35 Stat. at L., Part I, pp. 65-66.

recognized the need of some orderly plan for compensating injured workers. There was precedent, therefore, for the development of industrial accident-compensation laws. With a gradual awakening in the first decade of the twentieth century, the states began to experiment in this field about 1910.

New York enacted the first compulsory workmen's compensation law in 1910, although several abortive state attempts were made between 1902 and 1910. This legislation was applicable not to all industry but to 12 specified, dangerous occupations. Essentially, the law removed the common law defenses and required the employer to be held liable at specified rates for accidents occurring to his employees. Although this law did not go to the federal Supreme Court, the New York Court of Appeals was horrified at the potentialities of this new departure in social legislation and held it to deprive employers of their property in violation of both federal and state Constitutions.<sup>40</sup> While New York was frightened into amending her Constitution in 1913 prior to enacting another such law, other states went ahead; twenty-two accident-compensation laws were passed by various states, federal territories, and Congress for non-governmental and federal workers.<sup>41</sup> By the end of 1916, prior to final court approval of a test case workmen's compensation law, thirty-six laws had been enacted by the above groups.<sup>42</sup> The nature of present compensation legislation will be reviewed subsequently;<sup>43</sup> it will suffice to say here that the earlier laws sought to remove the common law escapes and to make employers responsible for definite monetary payments for various types of injury or durations of disability.

As is always true of any attempt to enact legislation that breaks sharply with the economic traditions of the past, workmen's compensation was carried to the federal Supreme Court for a ruling. This decision came in 1917 in the case of the *New York Central Railroad v. White*.<sup>44</sup> Although the case concerned a railroad company, it arose out of the death of a night watchman employed where a new station was being built. Consequently, the federal liability law of 1908 was not involved and the New York law enacted after the constitutional amendment of 1913 was at stake. The gist of the argument of the company was that the new law took property

<sup>40</sup> Millis, H. A., and Montgomery, R. E., *op. cit.*, Vol. II, pp. 194-195.

<sup>41</sup> Armstrong, B., *op. cit.*, p. 254.

<sup>42</sup> For an excellent survey of occupational accident-compensation laws through 1917 see: U. S. Bureau of Labor Statistics, Bulletin No. 240, *Comparison of Workmen's Compensation Laws of the United States up to December 31, 1917*. Washington, D. C.: U. S. Government Printing Office, 1918.

<sup>43</sup> See below, Ch. X.

<sup>44</sup> 243 U. S. 188 (1917).

without due process of law. In addition, the company contended that the degree of conviction was open to question, and that the employee's family was deprived of a chance of getting a larger settlement by suit, which was prohibited by the law since it stipulated a fixed payment.

The Court was not impressed by the arguments. It held that the states had clear authority to modify the common law defenses if they so desired. The statute in question only set aside one body of rules and established another. As to compensation for the specific death that gave rise to the suit, the Court stated:

"The pecuniary loss resulting from the employee's death or disablement must fall somewhere . . . the act in effect disregards the proximate cause and looks to one more remote—the primary cause . . . the employment itself . . . it cannot be pronounced arbitrary and unreasonable for the state to impose upon the employer the absolute duty of making a moderate and definite compensation in money to every disabled employee . . . we recognize that the legislation under review does measurably limit the freedom of employer and employee to agree respecting terms of employment, and that it cannot be supported except on the ground that it is a reasonable exercise of the police power of the State. In our opinion it is . . . supportable upon that ground."

Thus, the Supreme Court approved the extension of the police power into a part of the field of employer-employee relationships that had previously been considered by business as inviolable. The state of New York had been too doubtful; their constitutional amendment had not been necessary because the case before the Court turned on the deprivation of liberty protected by the federal Constitution.<sup>45</sup>

The early laws provided compensation only for accidents and usually only for those in certain industries. Occupational disease was not provided for in any law prior to 1917, when two laws were amended to include diseases. This omission was due not to absence of a problem of occupational disease or need of compensation; the very frequent omission of occupational disease coverage, even up to the present time, is probably due primarily to the difficulty of administering such a law or, perhaps more, to the fact that disease injuries are not spectacular. In the case of an industrial accident, there is some sudden happening that results in the injury or death of a person or group of persons. Such an event forces itself on the attention of many persons inside and outside of the work place. Ques-

<sup>45</sup> At the same time that the New York law was upheld, laws of Iowa and Washington were approved. See: For Iowa, *Hawkins v. Bleakly*, 245 U. S. 210 (1917); for Washington, *Mountain Timber Co. v. Washington*, 243 U. S. 219 (1917).



tions arise as to what will happen to the injured person or his family. But when a worker succumbs gradually to some disease that may render him as unable to work as an accident, the event is not forced on public consciousness to the same extent. Therefore, the development of occupational disease-compensation provisions was a much slower process. Their exclusion was a serious weakness in the early compensation laws.

Meanwhile, other government controls were developing that approached the problem of the physical risks of industry from another angle. Laws of this nature began to appear in 1886, when Massachusetts enacted legislation requiring the reporting of industrial accidents. Other states soon followed, but divergent definitions of industrial accidents and the weaknesses of enforcement prevented satisfactory results.<sup>46</sup> In addition, the laws made no attempt to influence prevention of accidents or to provide compensation once an injury had occurred.

Another approach to industrial injuries was through the prohibition of employment of certain persons or of the use of certain substances in specified occupations or processes. Attention has been called earlier in this chapter to early prohibitions against the employment of children in listed employments. In part, such restrictions were a recognition of accident hazards. An example of prohibition of substances, not a frequently used approach in this country, was the enactment by Congress in 1912 of a law that placed a discriminatory tax on matches of white phosphorous made in this country. This tax proved to be sufficient to stop the manufacture of all white phosphorous matches and prevent the occupational disease, "phossy jaw," previously the plague of match workers.

One last approach to the industrial injury problem should be noted; this field is indeed a broad one, and all that can be done is to call attention to the type of activity without going into detail. The various states have enacted laws requiring certain minimum safety conditions in plants, mines, and other places of employment. Massachusetts, in 1887, enacted legislation requiring the safeguarding of machinery, guarding of shafts, pulleys, and so forth.<sup>47</sup> Other states followed, some with laws establishing minimum standards for toilets, washrooms, and other sanitary facilities, while others enacted legislation requiring seating facilities or comparable arrangements where women were employed. Fire-prevention laws were enacted and minimum standards of lighting, heating, and ventilation specified by some legislatures. Special safety laws for persons employed in

<sup>46</sup> Commons, J., and Andrews, J., *op. cit.*, pp. 160-162.

<sup>47</sup> Blake, R. P. (ed.), *Industrial Safety*, Ch. II. New York: Prentice-Hall, Inc., 1943.

mines and tunnels and by transportation facilities were passed.<sup>48</sup> With such a great number of laws on a variety of subjects, it is not possible to examine each or even to summarize. It will suffice for our purpose to note that at the same time that social legislation was being enacted to aid those injured by industry legal efforts were being made to decrease the frequency of industrial injuries.<sup>49</sup>

### Organizing the labor market

At present, there is in the United States a nation-wide system of free, publicly operated employment agencies. The roots of this system were established prior to World War I by state action. Recognizing the need for offices through which unemployed workers could be given free assistance in searching for work, Ohio established the first public employment offices in the nation by legislative enactment in 1890. By that act offices were established in Cincinnati, Cleveland, Columbus, Dayton, and Toledo.<sup>50</sup> The example of Ohio was followed somewhat slowly by other states and, by 1916, ninety-six offices had been established in twenty-six states. Thus, with unemployment periodically becoming somewhat of a problem even before the war, the beginning of a system of public, non-fee-charging agencies had been set up, but it did not remotely approach the need. Many states still had no laws, and those with some provision had scattered and inadequate numbers of employment offices. There was no coordination of needs and openings from state to state.

The federal government did little prior to the war to provide public employment service. The first action taken was to set up, in 1907, an information service to aid in the more intelligent direction of immigrants to various parts of the country. After the outbreak of war in Europe the service was expanded to aid all job seekers, but its work was not highly effective. The establishment of a genuine federal system of public employment offices was a result of the war effort, and will be discussed in the next chapter.

### Early railway labor legislation

The federal government, which has assumed the responsibility for all controls affecting railway labor, began to establish itself in that

<sup>48</sup> For an extended survey that does not examine individual laws in detail see: Commons, J., and Andrews, J., *op. cit.*, Ch. IV.

<sup>49</sup> In addition to state legislation, the federal government established in 1910 the United States Bureau of Mines and the National Bureau of Standards. The former seeks to promote safety measures in mining; the latter seeks to gather and distribute information on safety standards. The Bureau of Labor Statistics, established in 1913, among other duties, collects and disseminates statistical data on industrial accidents.

<sup>50</sup> For a survey of public employment offices up to the first World War see: U. S. Bureau of Labor Statistics, Bulletin No. 241, *Public Employment Offices in the United States*. Washington, D. C.: U. S. Government Printing Office, 1918.

field before the turn of the last century. Reference has been made earlier in this chapter to the federal act pertaining to the liability of carriers for accidents. The federal Congress passed in 1888 its first Arbitration Act.<sup>51</sup> This provided for voluntary arbitration at the request of either party if the other party agreed. In addition, provision was made for investigation of disputes between management and labor on the railroads. The act was on the statute books for ten years; the arbitration provisions were never used and the provisions for investigation were used only once.<sup>52</sup>

In 1898 the Arbitration Act was repealed and in its stead the Erdman Act was passed.<sup>53</sup> The ill-fated Section 10 that was invalidated in 1908 in *Adair v. U. S.* has already been noted. The investigation provisions of the earlier law were dropped but those for voluntary arbitration were continued. In addition, for the first time, provision was made for representatives of the Commissioner of Labor and the chairman of the Interstate Commerce Commission to engage in conciliation and mediation to promote peaceful settlements. The operation of the act in its first years was disappointing, but it was used with some effect from 1906 until its repeal in 1913. Arbitration was employed in about six instances, and some combination of mediation or mediation and arbitration efforts was successful in 36 others.<sup>54</sup> The Erdman Act was replaced in 1913 by the Newlands Act. Because this act set up machinery for dispute settlement that was used during the war it seems wise to defer consideration of the Newlands Act to the next chapter.

In summary, the period prior to World War I saw the emergence of many problems of our modern economy. Almost all of the early legislation directed at these new problems, except for those of railway labor, came from the state legislatures. The early laws were groping and ineffective in many instances, and there were frequent expansions and modifications. To add to the problems of legislators faced with situations demanding solution, the spirit of an individualistic economy ran high, the unreal theory of equality of power of labor and capital was rampant, and the liberty and property mentioned in the fifth and fourteenth amendments were sacred. It is small wonder, therefore, that progressive social and labor legislation came so slowly.

The laws that were enacted were not received in a friendly fashion by the courts. Attempts to guarantee the right of railway workers to organize or of injured workers to compensation were at first un-

<sup>51</sup> 25 Stat. at L. 501.

<sup>52</sup> *Prentice-Hall Labor Course*.

<sup>53</sup> 30 Stat. at L. 424.

<sup>54</sup> *Prentice-Hall Labor Course*.

acceptable to the courts. Regulation of hours of work for men was not approved at first. All in all, the courts showed that they were reluctant to recognize social and economic change and adapt to it. In some instances, court rulings and attitudes did not long retard the development of protective legislation; in others, the disapprovals held for many years.

### Questions

1. What are the advantages and disadvantages of state labor legislation as compared with federal laws?
2. Can the Holden and Lochner rulings both be rationalized as valid and the two be made compatible?
3. Were there valid reasons for Congress to enact labor legislation for railroad workers rather than for all workers? Explain.
4. If yellow-dog contracts are sanctioned by the courts, certain freedoms of workers are, in effect, denied. If the contracts are not allowed, employer freedoms are denied. On what basis could members of the judiciary rule on such an issue?
5. Judicial approval of regulation of hours of work came before approval of minimum-wage legislation. How do you explain this? Was regulation of hours a more reasonable control than wage controls?
6. Workmen's compensation laws caused some of the costs of industrial accidents to become costs of production that the employer had to meet. In view of the problem of industrial hazards, was this the most logical and best approach that could have been used?

## CHAPTER IX

### THE EFFECT OF WORLD WAR I ON LABOR CONTROLS

#### Effects of war on economic controls

In April, 1917, the United States became an active participant in the World War that had been raging in Europe for nearly three years. Even before our actual participation in the war, its effects had been felt throughout our economy, injecting into it the stimulant of great increases in demand for goods. After the official entry, the stimulus was much greater. Embarking on a war brings many problems of economic adjustment and organization; some of these problems are peculiarly interesting and important to the student of labor. A brief examination of the problems that present themselves when a free market economy must be integrated into a national war effort will be of interest and value here.

The general over-all problem that comes with a war is that much of the freedom that has characterized our economy must be restricted in one way or another. A free market economy is one in which business, labor, and the public have a very large degree of freedom to buy and sell or otherwise pursue as effectively as they can their real or fancied economic interests. This pursuit of personal interest is one with very little planning in terms of social interests. When the emergency of war is present, however, it becomes imperative that self-interest be subordinated to the welfare and goals of the group. This may be done by legislation or government orders or it may be done by offering incentives to encourage individuals to fall in line with the national effort and using publicity drives and campaigns, and the like to try to achieve compliance with national policies. Our efforts in wartime have tended to put heavy emphasis on non-coercive methods of encouraging co-operative action, but these cannot always be used without some compulsion.

When a nation embarks on a war, one of the most important over-all economic problems that must be studied and acted upon concerns the most effective allocation of national resources. How much manpower should be allowed for the armed forces, how much should be allocated to productive civilian jobs, and, within this lat-

ter group, what are the relative manpower needs in steel, coal, rubber, oil, and a horde of other industries? Similar questions arise concerning the allocation of capital equipment, of raw materials, of transportation, and so forth. Such questions can be answered only on the basis of what promises to be most advantageous for the nation, regardless of the effects that the decisions and practices will have on individuals and groups.

Another unusually knotty problem of a war economy is that of wage policy. The enormously increased demand for all products and in turn for labor brings a condition in which wage rates tend to rise rapidly. The same tendency is present with regard to take-home wages, since long hours of work as well as high wage rates characterize a war economy. The question is how far should wage rates be allowed to rise. If there are no limits on them or the amount by which they can be raised, some industry not essential to the war effort, night clubs, let us say, might keep a full supply of labor by paying sufficiently high wage rates. Clearly, such is not in the interest of the war effort; what should governmental policy be toward wage rates and take-home wages?

A number of other problems related to wages are of unusual complexity in a war period; one of these is prices. Enormous increases in wages, more people at work, and the shifting of more and more of the products of the nation into war materials and supplies brings about a situation wherein demand for many goods exceeds the supply. This means rising prices, unless some manner of price controls is effected. Businessmen and many other persons object to price controls; on the other hand, most of the public objects to inflationary price jumps. Such rises mean unrest and dissatisfaction and lowered public morale. Hence, the policy to be followed in controlling prices becomes important.

Hours of labor per day and per week present another situation that demands a well-thought-out policy. One of the primary issues in this connection is the number of hours of work that will in the long run be conducive to optimum production. Too-long hours will cut down production per hour and even total production, while in many cases tending to increase absenteeism. On the other hand, too-short hours of labor do not represent the most efficient usage of facilities. The question then arises as to what shall be the minimum number of hours of work that will be construed as an adequate utilization of an employer's labor force.

Then comes the problem of the right of workers to organize in unions of their own choosing. Steady work, rising prices, and a general seller's labor market tend to encourage workers to organize or join unions. In addition, unions recognize that conditions are

ripe for organization, and their leaders try to take advantage of the situation. But in war and in peace, labor organization is likely to be, to the businessman who has not had such organization among his workers, unwelcome. Disputes over the organization of a plant can lead to a work stoppage and loss of production, which is especially bad in time of war. Consequently, a well-thought-out and implemented policy toward union organization becomes a must to the government of a free people engaged in a war. If the nation were not a government of free people, then the problem would not be of any import.

Another complex labor problem that arises out of a war crisis is that of labor disputes. As we have noted, war brings a period of rising prices and also one of great demand for labor. Attempts to keep wages up with or ahead of prices and to take advantage of the favorable conditions for extension of labor organization tend to result in labor unrest and trouble. During such an emergency period there are likely to be strong public and government pressures to keep disputes from breaking into open stoppages. Every effort is made to effect some sort of compromise settlement, questions of justice not being so important as those of what action is expedient for quick settlement. As a consequence, there tends to be built up a backlog of unrest and dissatisfaction that is likely to result, at the end of hostilities, in a wave of industrial warfare.

A final problem arising out of war is the great importance of maintaining an efficient transportation system with no interruptions in the service rendered. The problem of supplying the civilian and military needs of the nation puts a great strain on transportation facilities. Therefore, the job of ensuring continuous transportation service demands that careful attention be given to labor problems and issues that arise in the industry.

In essence, a war period emphasizes all the points of economic friction that are present but less noticeable during peacetime. With the problems and frictions sharper and the need of a smoothly functioning economy paramount, there is every reason to expect a marked broadening of the fields of government controls over economic problems. Such action is defensible; an uncontrolled war economy would be likely to end in an inflated and extremely unstable condition.

#### Organization of the labor market

In noting how the government sought to solve some of these problems that became especially acute during the first World War, it will be necessary to consider a period of time longer than actual hostilities. Economically, the effects of a war are usually felt, before

the firing begins, in the preparations for war, with their increased production, greater employment, rising prices, and so forth. And certainly the after-effects of war remain long after an armistice has been signed. It will be necessary, therefore, to note in this chapter some situations developing before the war and others that continue for years after it is over. In still other cases, events of the war years that were not directly a product of the war will be omitted and noted elsewhere.

In the organization of the labor market, the story of federal action is not an encouraging one. Attention has already been called to the establishment in the Immigration Bureau of an information service, which it was hoped would encourage a more intelligent movement of immigrants to places where economic opportunity existed; the decrease of immigration with the advent of war caused the service to extend its work to non-immigrants. However, the inexperienced personnel, mostly immigration and post office employees, tended to make difficult the building of an effective organization. By 1917 it was clearly failing to do the job of locating workers and placing them in war jobs.

Meanwhile, the Department of Labor had been set up in 1913 as a separate agency. Among other tasks, it was allocated the duty of assisting in finding job opportunities for workers. In 1917 the Secretary of Labor was granted, in a deficiency appropriation and a special grant from the President, a little over a million dollars to aid in the placement of wage earners as considered necessary for the effective prosecution of the war.<sup>1</sup> Thus, in January, 1918 the United States Employment Service was established as an independent unit in the Department of Labor; it was not connected with the Bureau of Immigration, in which the original manpower placement efforts of the federal government had centered.

In view of the fact that the new employment service was not created until our participation in the war was half finished and of the enormous tasks of organizing a nation-wide system of offices, securing cooperation of other government agencies and of the public, and of securing and training personnel, the record of the employment service is outstanding. Attempts were made to utilize agents of the Department of Agriculture and fourth-class mail postmasters and rural carriers in the recruiting and placement of farm labor. Newspapers were urged to devote space in each issue to the needs of local farmers for workers. Special divisions were set up in the service to encourage persons to transfer to war work and to encourage the employment of boys and women and the utilization

<sup>1</sup> Kellogg, R. M., *The United States Employment Service*, p. 4. Chicago: University of Chicago Press, 1933.



of Negroes.<sup>2</sup> Advisory boards composed of employer, labor, and public members were set up in the states and in nearly 1400 local areas before the war was over whose job was to encourage the use of the service and to advise on recruiting personnel and developing policies. Most important, by October, 1918, there were 832 public employment offices in operation in the country.<sup>3</sup>

By summer, 1918, the organization of the employment service was well underway. However, neither employers nor workers accorded it adequate recognition; employers, in their desperate search for manpower, sent out labor scouts to recruit workers, even by raiding the work force of some other employer. Workers sought their own jobs or listened to the promises of labor scouts. Consequently, there was extreme disorganization of the labor market, with job seekers and newly hired workers moving in every direction. In order to try to cope with this problem the President issued a proclamation in June, 1918, in which he *urged* "all employers engaged in war work to refrain after August 1, 1918, from recruiting unskilled labor in any manner except through this (the U. S. Employment Service) central agency." Labor was also *urged* "to respond as loyally as heretofore to any calls issued by this agency for voluntary enlistment in essential industry."<sup>4</sup> Although the proclamation urged rather than directed use of the employment service, it did throw a heavier burden on the new agency.

During the year of 1918, the only full calendar year of operation of the employment service, it received orders for over eight and three-quarter million workers, referred almost four million, and received reports from employers of placement of over two and one-third million. It was estimated that it saved workers \$8,000,000 in fees that would have been charged by private agencies making similar placements.<sup>5</sup> The service made plans for and began a program of aiding returned veterans to go from the service to employment, but this work was short-lived. Undoubtedly, in view of the fact that the organization was developed from the ground up, aided by very few persons with the experience needed in public employment service, the record compiled was an excellent one. Judged by methods of manpower control developed in the second World War, there were many things left undone. But the difference in duration of the wars, in the economic strains thereof, and in the pre-

<sup>2</sup> See Lescohier, D. D., *The Labor Market*, Ch. IX. New York: The Macmillan Co., 1923, for an extended discussion of the wartime record of the United States Employment Service.

<sup>3</sup> Millis, H. A., and Montgomery, R. E., *op. cit.*, Vol. II, p. 61.

<sup>4</sup> The text of the President's proclamation is published in the *Monthly Labor Review*, July, 1918, pp. 136-137.

<sup>5</sup> Lescohier, D. D., *op. cit.*, pp. 197-198.

war experience of the service warranted a more cautious approach to the problem in the earlier conflict.

After World War I the public was anxious to "get back to normal" as soon as possible. This meant removing government controls and cutting expenditures quickly. The employment service was a victim of this philosophy. By early 1919 money appropriated to the service had been spent and a request was made for a deficiency appropriation. Congress failed to grant the money requested, and the President was unable to appropriate from any other source. There was nothing for the service to do except cut back their operations at once. This was done, and by mid-year 1919 the service was reduced to a skeleton organization gathering some employment data and aiding in the placement of farm-harvest labor. It was to remain in this state of suspended animation for nearly fifteen years.

Limited relief from the closing of the federal offices came when some of the states and municipalities assumed the operation of offices abandoned by the federal service. In October, 1919, it was reported that some 300 offices were kept open.<sup>9</sup> However, most of these offices were understaffed, poorly equipped, and not well-coordinated with each other. For most of the country, effective public employment service went into a fifteen year eclipse.

### Government policy on labor organization

Both World Wars brought strong pressure for the organization of unions, and both wars resulted in rapid increases in the number of union members. It was to be expected that war periods would bring such activity on the part of unions. Prosperity in this country, with the exception of the 1920's, always has resulted in a period of increased and more successful union activity. That is the time when prices and profits tend to rise and the wage rates of unorganized workers lag behind. And with prices and profits up, employers are anxious to keep producing and thus are more willing to bargain with unions, rather than refuse and take the chance of a work stoppage. If prosperity brings union activity, then war logically would bring the greatest action because war creates the most feverish prosperity that our nation experiences.

Union efforts to extend membership in wartime are, therefore, an understandable attempt to capitalize on an economic situation, for union leaders are and in many instances must be opportunists. Few of those who push organization drives have ulterior un-American motives. Rather, they are men trying to seize an opportunity to accomplish a certain end that has been their goal before wartime.

<sup>9</sup> Kellogg, R. M., *op. cit.*, p. 10.

In addition to the conditions that make union activity more effective, there are reasons why the government may desire workers to be organized. The policies of the federal government in the first World War certainly encouraged the organization of workers into unions. Probably the reasons for encouragement of unionization of workers were twofold. In a plant with an organization of workers there was a means of communication between labor and management; thus, it would be easier for management to learn of labor's desires and interests and to disseminate the information it chose. A second reason for encouraging unionism was to keep the workers satisfied. Essentially, the whole program of the government was a catch-as-catch-can hodgepodge of policies designed to keep all groups as contented and cooperative as possible. If, for one reason or another, workers wanted a union in their plant, policy makers of the government were inclined to agree, if such were possible without antagonizing some other group. Possibly a third factor was in the minds of some persons who favored the development of unions; the thought of some was that unionism was in itself a desirable goal.<sup>7</sup>

The espousal by government of the workers' right to organize was administered by the National War Labor Board, to be discussed later in this chapter, but was set down as a recommendation by government labor experts late in March, 1918, a date prior to the creation of the board. The policy was stated by the War Labor Conference Board, a committee of five labor and five management representatives with two representatives of the public. It was one of a long series of boards set up in an attempt to establish adequate government labor policies. The Conference Board reported to the Secretary of Labor, recommending the creation of the new National War Labor Board and outlining the principles that should guide it. Certain of the guiding principles are of interest to us at this point.

The section of the recommended principles dealing with the right to organize reads as follows:

"Right to organize—1. The right of workers to organize in trade-unions and to bargain collectively, through chosen representatives, is recognized and affirmed. This right shall not be denied, abridged, or interfered with by the employers in any manner whatsoever.

"2. The right of employers to organize in associations or groups and to bargain collectively, through chosen representatives, is recognized and affirmed. This right shall not be denied, abridged, or interfered with by workers in any manner whatsoever.

<sup>7</sup> Wolman, Leo, *Ebb and Flow in Trade Unionism*, p. 23. New York: National Bureau of Economic Research, 1936, suggests that the view that trade unionism was in itself desirable was one reason for the policy of the government.

"3. Employers should not discharge workers for membership in trade-unions, nor for legitimate trade-union activities.

"4. The workers, in the exercise of their right to organize, shall not use coercive measures of any kind to induce persons to join their organizations, nor to induce employers to bargain or deal therewith.

"Existing conditions—1. In establishments where the union shop exists the same shall continue and the union standards as to wages, hours of labor and other conditions of employment shall be maintained.

"2. In establishments where union and non-union men and women now work together, and the employer meets only with employees or representatives engaged in said establishments, the continuance of such condition shall not be deemed a grievance,"<sup>8</sup>

Careful reading of this extract reveals that the theory of trade unionism was espoused but that, like an ostrich with its head buried, the board refused to face the fact that collective bargaining sometimes brings powerful prejudices and principles into play and, if unions are to develop, positive programs and action sometimes must be undertaken. Again, the statement of principles phrased some provisions with "shall," but on the matter of job tenure for those who joined a union or took part in its activities, the employer "should" not dismiss. Although no part of the statement of principles was legally enforceable, the latter provision was far less sharp and to the point. Further, the statement that employers might meet only with persons employed in the plant left the way open wide for the development of company unionism and a refusal to meet with non-employee representatives of independent unions. At some stages of collective bargaining, an independent union that is outside of the control of the employer will bring in officials not working in the plant. Under the policy statement of the conference board, refusal to meet with these representatives was an employer's right and he would have given the workers no ground for a grievance in so refusing. With this provision, the statement that workers should have the right to organize and bargain collectively was seriously weakened.

### The development of company unions

As the policy of the government toward unionism was applied, it developed that company unionism was as much of a beneficiary as was the independent labor movement. The National War Labor Board that was established to carry out the principles of the Conference Board was composed of the same persons as those who made

<sup>8</sup> U. S. Bureau of Labor Statistics, Bulletin No. 287, *National War Labor Board*, p. 32. Washington, D. C.: U. S. Government Printing Office, 1922.

up its predecessor; small wonder then that company unions grew rapidly. Many cases came before the board in which there was not and had never been any labor organization. With a need of some means of contact between workers and management, shop committees or company unions were set up.<sup>9</sup> Many of these cases were over the opposition of management. Organized labor did not object, however, in part because their ranks were growing by leaps and bounds and in part because it was thought that the shop committees would serve as training schools to prepare worker groups for subsequent unionization. But at the same time employers were learning how much more convenient for their needs company unions were than independent ones.

As a result of the policies laid down and followed by the National War Labor Board and of the inaction of the American Federation of Labor, the number of company unions multiplied many times. Whereas only a handful of firms had any sort of employee-representation plans before the war, the Bureau of Labor Statistics reported 145 such plans in effect in 1919.<sup>10</sup> One writer reports that the Labor Board itself directed the establishment of such committees in over 125 instances.<sup>11</sup> In the estimation of the Bureau, the plans operating in 1919 covered about 400,000 workers. Although many of the plans were instituted over the objection of management, once established, they proved desirable tools of management in large plants where a real need existed for some means of communicating worker desires and management policies. The works councils or shop committees served as this needed channel; it will be seen that the number of company unions, instigated as a company policy, increased rapidly after the war was over.

While company representation plans were growing rapidly, *bona fide* unionism expanded comparably. It has been estimated that the total membership of American trade unions grew from 2,582,000 in 1915 to 4,125,000 in 1919.<sup>12</sup> By 1920 the total had passed 5,000,000. The economic conditions favorable to this growth already have been sketched. One other factor should be noted. Although the policy of the federal government toward unionization of labor was very weakly worded with convenient loopholes scattered throughout, it was the strongest position in favor of organization taken up to that time. It enhanced the success of union organizing efforts.

<sup>9</sup> *Ibid.*, p. 26.

<sup>10</sup> U. S. Bureau of Labor Statistics, Bulletin No. 634, *Characteristics of Company Unions* 1935, p. 19, Washington, D. C.: U. S. Government Printing Office.

<sup>11</sup> Fairley, Lincoln, *The Company Union in Plan and Practice*, p. 32. New York: Affiliated Schools for Workers, 1936.

<sup>12</sup> Wolman, L., *op. cit.*, p. 16.

It should be noted in passing that the policy laid down by the War Labor Conference Board was in sharp conflict with the position taken by the Supreme Court concerning the right of workers to organize. It will be remembered that in the case of *Coppage v. Kansas* the Court denied states' power to outlaw yellow-dog contracts, and in *Hitchman v. Mitchell* it upheld the legality of such agreements. Decisions such as these did much to nullify organizing movements at almost the same time that other groups in the government were trying to encourage unions.

#### Special agencies for dispute settlement

Although the right to organize was one of the most knotty labor problems presented during the war, there were many others. Problems of wages, hours, wages paid to women, and Sunday, holiday, and overtime pay, for example, arose. Prior to the establishment of the National War Labor Board as an agency for settling all types of disputes, the federal government set up a number of different boards to handle disputes in certain industries. One of the earliest of these was the Cantonment Adjustment Commission, which grew out of a dispute and threatened strike of union men working on an army camp in Indianapolis. The Secretary of War and Samuel Gompers, then President of the A. F. of L., agreed after settlement of the threatened stoppage to the establishment of an adjustment board to handle future controversies. A Railroad Wage and Working Conditions Board was created in 1917, with three persons representing workers and three management, to study wages and working conditions on the railroads. Several boards were set up in the shipbuilding and ocean-shipping industries: the National Adjustment Commission for the longshoring industry, the Marine and Dock Industrial Relations Division for ocean-going shipping, and the Shipbuilding Labor Adjustment Board for shipbuilding labor problems. A Bureau of Labor was established in the Fuel Administration to handle labor disputes in the coal industry.<sup>13</sup> These boards all were joint labor-management bodies set up by high government officials and labor leaders, the Secretary of Labor and the President of the A. F. of L., for instance, to handle disputes as best they could and keep work going by whatever methods could be used.

This method of dispute settlement was far from satisfactory.

"In the autumn of 1917 it became apparent that the Government's method of dealing with labor problems arising in connection with war activities was unsatisfactory. Each production agency was handling its own labor problems. As a result there were incompatibilities in labor

<sup>13</sup> Taft, P., *op. cit.*, pp. 456-461.

policies not only between different departments, but also between different bureaus of the same department . . . unification of labor policy was the logical initial step in bringing about the necessary industrial stability."<sup>14</sup>

As a result of various conferences called by the Secretary of Labor in late 1917 and early 1918, culminating in the War Labor Conference Board that reported on March 29, 1918, the President, on April 8, issued a proclamation creating the National War Labor Board. The powers of the new twelve-man board were "to settle by mediation and conciliation controversies arising between employers and workers in fields of production necessary for the effective conduct of the war, or in other fields of national activity, delays and obstructions which might, in the opinion of the national board, affect detrimentally such production."<sup>15</sup> This group was specifically instructed to follow the principles laid down by the War Labor Conference Board. The principles affecting the right to organize have already been noted. That women should be "allowed equal pay for equal work" was among other pertinent provisions. The basic eight-hour day was recognized in all cases where the law required it, and in all other questions of hours of work settlement was to be made "with due regard to governmental necessities and the welfare, health, and proper comfort of the workers." Maximum production in all war industries was to be maintained. In fixing wages, hours, and working conditions, wage scales and labor standards existing in the locality were to be considered. Finally, it was stated "that the right of all workers, including common laborers, to a living wage is hereby declared. In fixing wages, minimum rates of pay shall be established which will insure the subsistence of the worker and his family in health and reasonable comfort."

Acting under this body of principles, the board functioned for sixteen months, although its activity and effectiveness declined gradually after the armistice. It discontinued meeting in June, 1919, and formally disbanded on August 12 of that year. During its operation the board was brought into 1251 controversies. Where possible, cases were referred to the dispute-settlement agencies of the various government departments, or to army ordnance or other divisions of the armed forces for solution. In case of such referral, the agency handling the dispute was to be governed by the policies of the War Labor Board. The bulk of the cases brought before

<sup>14</sup> U. S. Bureau of Labor Statistics, Bulletin No. 287, *National War Labor Board*, p. 9.

<sup>15</sup> *Ibid.*, p. 84.

the board centered on the wage question, with hours of work and discrimination against union members also important.

#### Enforcement of board rulings

One serious problem facing the board was the enforcement of its decisions. Since the terms of its creation gave no legal authority for enforcement, the board relied heavily on the support of public opinion and of the various governmental agencies. Sufficient pressure was exerted to bring about compliance in most cases; where this was not sufficient, other means were used—in three outstanding instances, executive action of the President.

One of these disputes involved the Western Union Telegraph Company in the third case on the docket of the board. During the dispute it was made known that the company was opposing the unionization of its workers. The board requested that Western Union desist from the practice; this the company refused to do. The President then asked publicly that the company abide by the decision of the board. Again the request was ignored, and the employees threatened to strike, whereupon the Government seized and operated all telephone and telegraph lines. The Smith and Wesson Arms Company case involves a similar story. Refusal of the company to comply with a ruling of the board and a request of the President led to seizure and operation of the plant by the War Department. A third case involved members of the Machinists Union, who were striking in the Bridgeport, Connecticut, area against the Remington Arms Plant and other ordnance plants thereabout; the central issue was a wage increase. The board was unable to reach a unanimous decision and the case was referred to an arbitrator; the solution handed down was accepted by about 90 per cent of the workers, but the remainder refused and elected to remain on strike. The President then took matters in his own hands, writing a letter that stopped the strike at once. After reviewing the situation, he closed the letter as follows:

"Therefore, I desire that you return to work and abide by the award. If you refuse, each of you will be barred from employment in any war industry in the community in which the strike occurs for a period of one year. During that time the United States Employment Service will decline to obtain employment for you in any war industry elsewhere in the United States, as well as under the War and Navy Departments, the Shipping Board, the Railroad Administration, and all other government agencies, and the draft boards will be instructed to reject any claim of exemption based on your alleged usefulness on war production."



A letter to the company followed, urging reinstatement of the strikers. The recalcitrants complied and the stoppage ended.<sup>16</sup>

In retrospect, the Bureau of Labor Statistics suggested that the most important general results of the decisions of the board were: "(1) bargaining relationships between employers and employees, whether organized or unorganized, and (2) the establishment of the principle of the living wage in industry."<sup>17</sup> Although the policies followed doubtless did encourage collective bargaining, the encouragement was not an unmixed benefit to unions; the marked growth in company unionism has already been noted. As far as the living wage is concerned, the evaluation is very doubtful, much depending on the definition given for a living wage. On one occasion the board referred to a living wage as one that would permit the worker and his family to subsist in reasonable health and comfort. Under such a definition, the living wage has always been and still is for many workers a goal never attained.

All in all, the board did a commendable job. In view of the time at which it was established, its guiding principles were as progressive as could be expected. Using them as guideposts and using weak and unreliable means of enforcement, the board did much to encourage labor peace and reasonable settlement of disputes that could not in wartime be fought out as they might in peacetime.

### The U. S. Conciliation Service

While emergency boards and committees were being created right and left for the settlement of labor disputes, another agency was growing slowly. When the Department of Labor was created in 1913, the Secretary of Labor was given the power to act as mediator in labor disputes and to appoint commissioners of conciliation whenever he judged it to be in the best interests of industrial peace so to do. From that time until 1917 there were a few persons in the department acting as conciliators. However, the United States Conciliation Service was formally organized in 1917 as a division of the Department of Labor, and all mediation work in that agency was concentrated in the new body. The service expanded rapidly and by 1919 had a staff of 79 conciliators. The service reported that it "adjusted" 1073 cases in 1918, and in 1919 the number increased to 1442.

The strange situation is that little is said of the function of the Conciliation Service, while in both wars the War Labor Boards have occupied the center of the stage. Probably this is due in good part

<sup>16</sup> U. S. Bureau of Labor Statistics, Bulletin No. 287, *National War Labor Board*, p. 36 *et passim*.

<sup>17</sup> *Ibid.*, p. 23.

to the fact that the Conciliation Service is anything but spectacular. Federal conciliators must act without fanfare behind the scenes to encourage the parties to a dispute to reach some agreement in order that work can continue. Nevertheless, in the years of 1917, 1918, and 1919 the Conciliation Service was able to adjust over 2750 disputes; although no two disputes are alike and numerical comparisons mean very little, it might be noted that this figure is more than double the number handled by the War Labor Board in 16 months. And although the War Labor Board and other emergency committees came to an end at the close of the war ending in 1918, the Conciliation Service has continued to function up to the present day.<sup>18</sup>

### Transportation labor and the government

The development of a war economy always puts a strain on the transportation system, and peaceful relationships between labor and management on the carriers are of especial importance. As the United States approached actual participation in the war, the Newlands Act of 1913 was the current legislation by which the federal government hoped to encourage peaceful labor relations. It should be noted as a point of departure for examination of wartime developments.

The Newlands Act of 1913<sup>19</sup> grew out of the dissatisfaction of both labor and management with an arbitration award handed down in 1912 as the final solution of a dispute between 52 eastern railroads and the Brotherhood of Locomotive Engineers. Union and railroad officials conferred and drafted a bill that was enacted in 1913. The Newlands Act set up the first permanent Board of Mediation and Conciliation, with a full-time Commissioner of Mediation and Conciliation and two other government officials as members of the new board. The board was to rely on mediatory action to encourage peaceful settlement of all disputes. If this failed, arbitration by three- or six-man panels could be used if the interested parties agreed. No provision was made for enforcement.

Although the Newlands Act remained on the statute books for 13 years, its functioning was primarily a prewar action. It was virtually circumvented when the federal government seized the railroads in 1916 and was completely by-passed by the Transportation Act of 1920, although not repealed until 1926. Between 1913 and 1919 it disposed of 148 cases. However, only ninety-one of the cases were actually settled by action of the board; of these, seventy

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<sup>18</sup> Millis, H. A., and Montgomery, R. E., *op. cit.*, Vol. III, pp. 727-729. See also: Kaltenborn, H. S., *Governmental Adjustment of Labor Disputes*, pp. 14-15. Chicago: The Foundation Press, Inc., 1943.

<sup>19</sup> 38 Stat. at L. 103.

were disposed of by mediation alone and twenty-one by mediation and arbitration.<sup>20</sup> Thus, although the experience under the Newlands Act was not excellent, it was clear that mediatory action was the most satisfactory type of government aid in settling labor disputes. On the railroads and in other types of employment this has been the prevalent attitude at all times right up to the post-World War II period.

In case either party decided to flout the action of the board, there were no provisions for enforcement. In only two cases under the Newlands Act did this happen. In the first of these instances, a dispute between ninety-eight western railroads and the Brotherhoods of Engineers and Firemen and Enginemen, enough pressure was exerted through the intervention of the President that the parties agreed to arbitration. The second instance was not so easily solved. In this case the brotherhoods demanded, in 1916, a basic eight-hour day. Subsequent events showed that there was no especially deep concern for the actual number of hours worked for reasons of health or safety, but rather an interest in making all work over eight hours payable at overtime rates. The parties to the dispute could not agree, mediators were unsuccessful in obtaining a settlement, and arbitration was refused by the brotherhoods. The Board of Mediation and Arbitration appealed to the President as their last resort; he, after conference with both parties, suggested a settlement rejected by management. The railroad unions threatened a nationwide strike at a time when the imminence of war made it imperative that the railroads be kept operating. To stave off the strike, the President asked Congress for a law setting up a basic eight-hour day on the roads. He also asked that the Newlands Act be revised to outlaw strikes or lockouts prior to government investigation. The law that was passed covered the request for a shorter work day but did not make any provision for investigation prior to work stoppages.<sup>21</sup> However, as the law stood it was enough to satisfy the brotherhoods; they cancelled the strike.

The Adamson Act of 1916<sup>22</sup> provided "that beginning January first, nineteen hundred and seventeen, eight hours shall in contracts for labor and service, be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning the compensation for services. . . ." The President was to appoint a commission to study the effects of the act and report in from six to nine months. Pending that report, "the compensation of railway em-

<sup>20</sup> Report of the Commissioner of Mediation and Conciliation, reprinted in Ellingwood, A. R., and Coombs, W., *op. cit.*, pp. 317-319.

<sup>21</sup> Kaltenborn, H. S., *op. cit.*, pp. 44-45.

<sup>22</sup> 39 Stat. at L. 721.

ployees . . . shall not be reduced below the present standard days wage. . . ." For employees of about 85 per cent of the railroads this meant pay for an eight-hour day that had previously been earned in ten hours. The carriers immediately questioned the act. Contending that it was unconstitutional, they asked for and received an injunction against the enforcement of the bill, and the case was carried to the Supreme Court. The Court weighed the constitutionality of the law in 1917 in the case of *Wilson v. New*.<sup>23</sup> The carriers insisted that the law was merely a wage-setting law with no other purpose behind it. The unions contended that it was regulation of hours of work, a field into which the federal Congress had previously stepped in enacting safety regulations. Upon examining the law a five-man majority of the Court held that the emergency involved warranted the enactment. As the majority saw the problem, "if the situation . . . with which the act of Congress dealt be taken into view,—that is, the dispute between the employers and employees as to a standard of wages, their failure to agree, the resulting absence of such standard, the entire interruption of interstate commerce which was threatened, and the infinite injury to the public interest which was imminent—it would seem inevitable to result that the power to regulate necessarily obtained and was subject to be applied to the extent necessary to provide a remedy for the situation. . . ." Thus, Congress was supported by the Court; the basic eight-hour day came into being and has remained since that time on the interstate railroads of the United States. However, the roads did not long experience directly the effects of the law, since shortly after its validation they were taken over and operated by the government for the duration of the war emergency.

After America's entrance into World War I in April, 1917, the railroads remained in private hands until December 28, when the federal government took them over and operated them until March 1, 1920. Government labor policies and controls during this period of operation are of interest. In general, the Railroad Administration was quite friendly to railway labor; wages were raised, the basic eight-hour day was established for compensation purposes, and long strides forward were made in the handling of labor disputes.<sup>24</sup> In the field of wage adjustment, certain of the brotherhoods had demanded wage increases just prior to government seizure; immediately after the roads were taken over a promise was made to union leaders that their demands would be investigated and any adjustments made retroactive to January 1, 1918. A substantial increase

<sup>23</sup> 243 U. S. 332 (1917).

<sup>24</sup> For a brief survey of labor policies under government operation see: *Prentice-Hall Labor Course*.

in wages was given on the basis of the report by a board appointed to investigate the wage issue.<sup>25</sup> Many questions arose out of this wage increase and other demands, so that a Board of Railroad Wages and Working Conditions was created to advise the Director General of the Railroads on action in this field. There was no other general wage increase during the war, but there were many adjustments to eliminate inequalities.

In relations with organized labor, the Railroad Administration regained the ground lost in 1908 in *Adair v. U. S.* when the anti-yellow-dog contract provisions of the Erdman Act had been declared unconstitutional. The Director General ordered in February, 1918, that there be no discrimination of any sort against employees on the basis of membership or non-membership in a union. This gave many workers an opportunity they had not previously had of joining a union if they so desired; the results were an increase in the membership of railway worker unions. All in all, the government put considerable reliance on the leaders of the railway labor unions for advice and for aid in settling disputes that plagued the railroads as well as other industry.

It will be recalled that the Newlands Act of 1913 was in effect throughout the war; the provisions of the act meant relatively little, however, after the outbreak of war. By June, 1917, the mediation machinery of the Newlands Act had been applied successfully in fifty-eight cases; in the next two years, which included the months during which the war was fought, only eighteen cases were mediated. Moreover, the cases that were handled under the Newlands Act during the war were small ones involving few workers. Like the Conciliation Service of the Labor Department, the Board of Mediation and Conciliation was by-passed and a wartime organization set up. In case of major problems, such as the general wage trend, a special advisory board might be created. However, for more routine problems, semi-permanent bodies were established; the Board of Railroad Wages and Working Conditions has already been noted. Three other wartime railroad labor boards were created.

In collective bargaining, many disputes arise over the interpretation of the meaning of contract provisions or the awards by arbitrators. In order to solve peacefully as many such disputes as possible, the Director General of the Railroads early in 1918 approved an agreement between the operating brotherhoods and regional directors of the railroads calling for the establishment of an eight-man Railway Adjustment Board. Half of the members of the Board

<sup>25</sup> U. S. Bureau of Labor Statistics, Bulletin No. 303, *Use of Federal Power in Settlement of Railway Labor Disputes*, p. 70. Washington, D. C.: U. S. Government Printing Office, 1922.

were to be selected and paid by the carriers and half by the unions. The body was not to act in any dispute until workers and the carriers had exhausted all their resources of settlement; then the case was to be referred to the board by the Division of Labor of the Railroad Administration. The board was to decide controversies over the interpretation of wage agreements and to adjust grievances of other sorts that proved too knotty for routine collective bargaining. Failing settlement by the board, that is, a decision by a majority of the board, any four of the members could refer a case to the Director General of the Railroads for final solution.<sup>26</sup>

This board handled disputes arising among the personnel operating the trains. In May, 1918, a like board was established to handle disputes arising in the shop crafts. In November, 1918, a third board was created to handle disputes coming from telegraphers, switchmen, clerks, and maintenance-of-way employees. It was reported by officials of the Railroad Administration that the system functioned unusually well. For persons who were not covered by any one of the three boards, and before the second and third were created, disputes of an individual or group were handled by representatives of the Division of Labor who were assigned to cases that failed of settlement at lower levels.

Such, in essence, was the railway labor policy of the federal government while it operated the railroads. Some persons held that the government pampered labor too much, but did get results. On this point, the final evaluation by the Bureau of Labor Statistics seems valid:

"... whether labor was pampered or whether the workers received only fair play, the fact remains that during the Federal control of the railroads labor difficulties on the roads were at the minimum, and this spirit of cooperation undoubtedly promoted the successful prosecution of the war."<sup>27</sup>

The events and policies sketched in this chapter are the essence of the influence of the war on government labor controls and policies. In the years of 1917-1919, when the nation was in the grip of the war and its aftermath, a few other events occurred that must be noted, but because they were not a product of the war they do not fit into this chapter. Already we have noted the Hitchman decision of 1917, with its approval of yellow-dog contracts, and the 1917 sanctioning of the exercise of the police power to enact workmen's compensation laws. Other matters remain to be noted, especially the developments in federal attempts to control child labor.<sup>28</sup>

<sup>26</sup> *Ibid.*, pp. 73-74.

<sup>27</sup> *Ibid.*, p. 75.

<sup>28</sup> See below, Ch. XI.

### Effects of war experience on future labor controls

What then was the legacy of the first World War? From the point of view of the person interested in labor problems and in government labor controls, this subject should be broken into two parts: (1) the residue of the war in terms of social and economic problems that made future labor controls necessary or desirable, and (2) the experience with government controls that gave a basis for establishing or revising government policies.

With regard to number one, probably the most striking condition was the intense industrial unrest that prevailed. Despite the attempt to limit strikes during the war, there were many, although they tended to be of relatively short duration and to include small groups of workers.<sup>29</sup> With the demise of the War Labor Board and the disappearance of a war psychology, however, the situation was ripe for much labor trouble. Living costs were skyrocketing, and workers hoped to push wages up; unions were anxious to preserve or extend wartime membership gains; many employers wanted to put an end to the expansion of unions while there was time. All of this spelled labor unrest. It showed itself in over 3600 strikes in 1919 alone, some of them being widespread and covering entire industries, such as steel.

The animosity between unions and employers manifested itself in another way. In the fall of 1919 President Wilson called a conference of union-employer-public representatives to discuss and make recommendations concerning peaceful labor-management relations. The conference broke down over the inability of labor and management to agree on the principle that collective bargaining between management and independent unions was desirable. Employer representatives were willing to back "collective bargaining" with company unions, a misuse of terms, but no more.

The exact results of this intense animosity between workers and employers over governmental labor policies are not clear. No significant progressive labor legislation came during the 1920's, except for railroad workers; perhaps the antagonism of employers toward unions took care of that matter. On the other hand, numerous anti-labor court decisions were rendered by all levels of courts. There were many injunctions issued and the Supreme Court approved severe restrictions on the coercive action of organized labor. Probably the anti-Red hysteria of the immediate postwar period and the continuing opposition of the employer group and the public to or-

<sup>29</sup> For data on strikes and time lost see: U. S. Bureau of Labor Statistics, Bulletin No. 651, *Strikes in the United States 1880-1936*, Ch. II, Washington, D. C.: U. S. Government Printing Office, 1938.

ganization of workers account for some of the conservatism of the courts.

Another economic by-product of the war period was the company union; firmly established by the end of the war, it continued to grow throughout the decade of the twenties. The insistence of many employers on some sort of company unionism was one of the causes of some of the pro-union federal legislation of the 1930's.

In the field of government controls, the war gave an excellent laboratory lesson. The experiences of the various government boards handling labor problems have been utilized a great deal since that time in the legislation and executive action used to establish labor controls. With regard to the railroads, the labor policies of the war period began to reappear in 1926. In laws regulating other types of labor and in heavy reliance on executive action, practices of the war years began to reappear with the F. D. Roosevelt administration.

The wartime action of the executive branch of the government was clearly catch-as-catch-can. Where it was thought necessary to create a new and impressive agency to do a certain job, such as to settle labor disputes, it was done even if it meant by-passing an already established body. Where it was possible for the President to intervene personally and get the desired results, that was done. Where it was necessary to seize and operate a plant or threaten strikers with being drafted into the military forces, that was done. When all else failed, special legislation was enacted in one instance. It was a matter of opportunistic pressures, cajoling, and threatening, the situation at hand dictating the approach taken. All was a surprisingly accurate preview of policies followed in the second World War.

In addition to the executive action just noted, there was other experience with control by non-legislative means. The whole machinery for dispute settlement from the Cantonment Adjustment Commission to the National War Labor Board was established by executive orders of the President or the secretaries or directors of subdivisions of the government. This particular practice was followed in many instances in the 1930's when codes and control bodies were created in great number by executive orders. The advent of the war increased the practice.

The war also left an enlarged labor movement, one that doubled between 1915 and 1920. During the war the active, but not selective,<sup>30</sup> sanction of collective bargaining aided the increase. But it was not a broad-based or dynamic labor movement, and it went into

<sup>30</sup> Not selective in the sense that any union, whether company dominated or not, was sanctioned.



a coma from which it was aroused fifteen years later by a renewed policy of government sponsorship of unionism and by a competitive organization that undertook to organize the great body of workers in mass-production industries.

In government policies toward railroad labor important results outlived the war. The basic eight-hour day survived and continued through the second World War. Experience in the settlement of disputes confirmed the government policy of relying on mediation as the backbone of its policy. Also, the doctrine that railroad workers should be accorded the right to join unions and bargain collectively through representatives of their own choosing survived, after a period from 1920-1926 when the right was not officially backed.

Benefits of the experience in government labor controls that came from the first World War were relatively short-lived. But a surprisingly large number of practices followed at the time have been resurrected. The first of these was applicable to railroad labor; following were many policies, such as the espousal of the right to organize, which were made the doctrine of the federal government in the 1930's. And finally, when World War II came, a strikingly similar pattern was employed. Perhaps this is testimony to the wisdom of the path followed in the first World War; indeed, it seemed, twenty years later, still to be the logical one to follow in a period of national emergency when a measure of individual freedom must be retained while at the same time seeking unified action along a course laid down by the legislative and executive branches of the government.

### Questions

1. What are the economic conditions created by a major war that tend to increase the area and intensity of government controls over labor-management relations?
2. Why did the federal government embark during the first World War upon a policy of encouraging the organization of labor?
3. Was the failure of the A. F. of L. strenuously to oppose the formation of company unions a wise policy from its standpoint?
4. During both World Wars there were a number of instances in which special war agencies were established to handle matters, such as labor disputes, that existing government agencies previously had handled. Evaluate this practice.
5. Why was it that the war seemed to offer so little experience that was utilized immediately after the cessation of hostilities? Was there no need for extension of any of the wartime practices after the war?
6. In the light of the problems existing at the time, evaluate the labor policy of the federal government during the first World War.

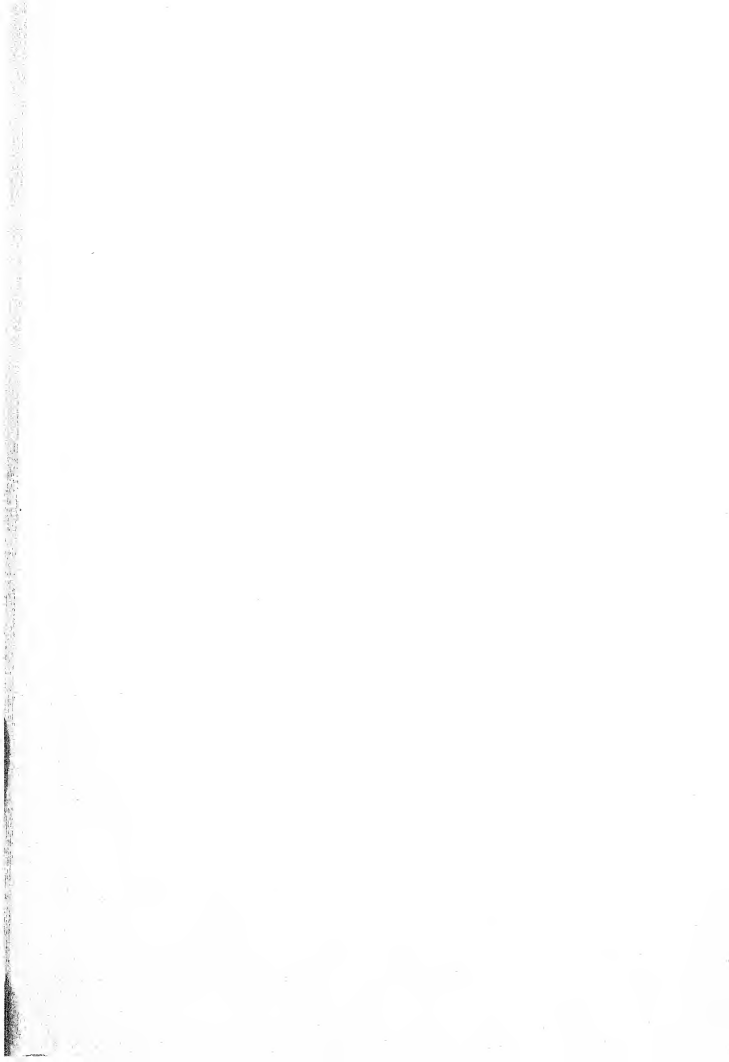
## PART II

### INTRODUCTION

The eleven chapters included in Part II cover the transition period during which most labor controls reached an approximation of their present form. With one notable exception, the general philosophy and structure of government guidance in the search for solutions to labor problems had attained this approximation prior to World War II. Although that war caused widespread temporary changes, many of them disappeared after the war was over. The exception, however, was in the field of management-labor relations, where the situation was entirely different; postwar tensions and distrust brought, in 1947, a sharp change in the policy of the federal government on this point.

Therefore, some chapters of Part II will bring subject matter down through the post-World War II period and others will not. In matters like workmen's compensation, child labor, hours of work, and social security, in which there have been no marked shifts in philosophy and technical changes in the laws have been slight, the discussion herein is complete. However, in labor-management relations the change has been so marked in the postwar period that it must be noted later in Part III.

Already it has been seen that the periods of time covered in any one of the parts of this study are used rather flexibly. The decision as to how far to carry the exploration of a certain phase of control has been based more on prewar and postwar attitudes toward the issue in question than on arbitrary dates. This flexibility in organization has been carried even farther in the discussions of the National Labor Relations Act and certain dissenting opinions in court cases because the general philosophy found in dissents of justices like Brandeis, Holmes, and Cardozo and the legislative philosophy behind the National Labor Relations Act indicate a trend that this nation probably will follow, with a certain amount of hesitation and balking now and then. Periods of reaction come from time to time, but, if our present form of economy and government are to continue, progressive social and economic government controls must continue.



## CHAPTER X

### MODERN HEALTH AND SAFETY AND WORKMEN'S COMPENSATION LAWS

#### Reasons for safety and compensation laws

Brief note was made in Chapter VIII of the problem of industrial safety that developed with the growth of modern mechanized industry. Recognition of the problem was indicated by the fact that prior to 1917 more than 30 states and federal territories enacted laws providing compensation for industrial accidents, despite doubt as to whether the legislation was constitutional. But the problem remained despite safety measures and the expansion of compensation laws.

Safety and health regulations and workmen's compensation laws have remained a field of state regulation. Although the elasticity that has been read into the commerce clause in the past decade might warrant federal control in the field of accident compensation, no attempt has been made to step into the field, other than as regards federal employees and private employees in federal territories, this being an exercise of federal control only where the states have not been able to act. Since the states clearly do have police power in this field and almost all of them do have laws of varying degrees of effectiveness on their statute books, federal controls are unlikely.

This does not mean that the federal government is entirely divorced from safety, health, and workmen's compensation controls. Aside from the controls mentioned in the paragraph above, for which the federal government is responsible, the Division of Labor Standards of the Department of Labor is able to exert some influence on the kind and type of legislation enacted. Analysis of the provisions and administration of federal and state labor laws is continuously carried on, and the information is supplied to interested groups. Also, assistance is given to states, on request, in the drafting or revising of labor laws. The efforts of the division are steadily directed at encouraging the enactment or improvement of labor laws in health and safety and other fields.<sup>1</sup> Thus, the Department of

<sup>1</sup> For a review of the activities of the division see: *Thirty-second Annual Report of the Secretary of Labor*, pp. 11-16. Washington, D. C.: U. S. Government Printing Office, 1945.

Labor indirectly influences the legislative enactments of the states. In addition, other federal agencies with narrower coverage have promoted health and safety of working children, of miners, and, during World War II, of many other groups.<sup>2</sup>

Pre-World War I safety regulations were noted briefly in Chapter VIII; after the war the safety regulations begun earlier were continued. By the mid-forties every state had some department or division charged with the duty of promoting safety among its workers. All have laws that in some way regulate working or safety conditions in one or more industries.

Despite the safety laws that have been enacted and the safety programs that were put into effect voluntarily by employers, the problem of industrial injuries remains a difficult one. It was estimated that in 1940 there were 16,400 fatal accidents in industry, nearly 110,000 persons suffered permanent disablement of some sort, and nearly 1½ millions suffered lost-time accidents.<sup>3</sup> By 1943 the figures were increasing: 18,400 were killed, nearly 110,000 permanently disabled in some manner and with varying degrees of incapacity, and over 2¼ million had lost-time accidents. The loss of time caused by the accidents was estimated at 274,000,000 man-days.<sup>4</sup> On the basis of a five-day work week, this loss was more than the work of a million persons for a year. By 1945 and 1946 the accident toll was declining slightly. In those years the Bureau of Labor Statistics estimated about 16,000 deaths from industrial accidents, approximately 90,000 partial or total permanent disabilities, and over 1,900,000 temporary disabilities. With standard lost-time allowances for deaths and loss of members of the body added to work-time lost, the total man-days lost was over 230,000,000.<sup>5</sup> Preliminary estimates for 1947 indicated only slight changes from 1945 or 1946.<sup>6</sup> It must be kept in mind, however, that each year the labor force grows larger and that a given number of accidents with a larger work force may mean a safer record than an earlier year with fewer accidents.

Since the problem of industrial accidents remained with no rapid change in its severity, the movement to enact workmen's compensation laws, which was well-underway before the first World War, con-

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<sup>2</sup> For example, during the war the Division of Labor Standards strongly promoted improved safety conditions in dangerous occupations, such as foundry work. Other wartime agencies were interested directly or indirectly in greater safety.

<sup>3</sup> U. S. Bureau of Labor Statistics, Bulletin No. 694, *Handbook of Labor Statistics*, p. 405. Washington, D. C.: U. S. Government Printing Office, 1942.

<sup>4</sup> *Thirty-second Annual Report of the Secretary of Labor*, p. 11.

<sup>5</sup> *Monthly Labor Review*, September, 1946, Vol. 63, No. 3, pp. 390-391 and October, 1947, Vol. 65, No. 4, pp. 442-444.

<sup>6</sup> *Monthly Labor Review*, March, 1948, Vol. 66, No. 3, p. 301.

tinued thereafter. By 1925 workers in forty-two states, Alaska, Puerto Rico, and Hawaii were covered by accident compensation laws, as were federal employees. In addition, all but three states having laws in 1919 had revised them by 1925.<sup>7</sup> The revisions liberalized the benefits of the laws and extended the coverage. By 1925 twelve of the state laws covered occupational disease. It is interesting to note that all of the states not requiring compensation of workers for industrial injuries were relatively lightly industrialized southern states: Arkansas, Florida, Mississippi, Missouri, and North and South Carolina.

The expansion and improvement of compensation laws continued slowly after 1925. By 1936 sixteen states had seen fit to compensate for occupational disease, an increase of only four jurisdictions in twelve years. Meanwhile, the few states that had no laws gradually came into line; by 1943 all states except Mississippi had enacted compensation laws, a situation which existed until 1948. The coverage of occupational disease was extended so that by 1946 thirty-three states and the federally controlled areas provided some occupational disease compensation, although some of it was very meager and inadequate. As a result of considerable state workmen's compensation legislation in 1947, the number of states offering such protection increased to thirty-nine.<sup>8</sup> Despite this extension, only about half of the workers in the country were covered in 1948 by workmen's compensation laws. This results from the exemptions in coverage to be noted later and the elective provisions of some laws.

Workmen's compensation laws probably have had a beneficial effect on the prevention of accidents. Although employer policies are not the sole cause of all or even a majority of industrial accidents, it is clear that safety-conscious employers can institute policies that will cut heavily into the number of accidents. Workmen's compensation has helped to induce accident consciousness in many instances. Under workmen's compensation laws, employers are required to pay into a fund (one of a number of plans may be used) or otherwise make provision to finance medical and hospital care and to pay monetary benefits to industrially injured workers; as a result, employers begin to wonder about methods of decreasing the number of accidents so that costs will be decreased or held down.

This consciousness is even more acute if the insurance premiums charged an employer are set on the basis of merit rating. Under such an arrangement, the better firms, in terms of the number of

<sup>7</sup> U. S. Bureau of Labor Statistics, Bulletin No. 379, *Comparison of Workmen's Compensation Laws of the United States as of January 1, 1925*, p. 1, Washington, D. C.: U. S. Government Printing Office, 1925.

<sup>8</sup> *Monthly Labor Review*, October, 1947, Vol. 65, No. 4, p. 415.

accidents, get the lowest rates and the poorer firms pay higher rates for their insurance. The merit rating may be either experience or schedule rating. In experience rating, the insurance charges are based on an examination of the accident experience or record of the company being rated. Under schedule rating, the charge is set upon an estimate of the probability of accidents, judging by an examination of the plant, its equipment, and methods of doing the job. Under either plan, it pays to have a low accident rating; and when it is profitable to do a socially desirable act, the act may soon be commonplace. Safety consciousness owes its growth in part to the fact that compensation laws have made it desirable to prevent industrial injuries.

### Common provisions of compensation laws

With the above sketch of the development of accident- and disease-compensation laws in mind, we can turn to an examination of the most common provisions of the laws. Since there are more than 50 different laws in the various states and federal jurisdictions, it must be kept in mind that subsequent comments and analysis will not be entirely true of any one law. Every law will have certain weaknesses and other strong points that merit commendation. The second World War had no especial effect on the public attitude toward compensation and there are no significant changes due to wartime or postwar developments. As a result, the information in this chapter brings the data on compensation up to the close of 1947.<sup>9</sup>

Perhaps before examining in considerable detail the variations found in the different state laws it might be well to sketch a composite law; this will indicate the common divisions of the laws and the average or normal provisions of each part of them. For this purpose, let us assume that a state without such legislation decided to adopt a workmen's compensation law and wished to do about the same as other states had done. In such a case the law probably would provide that all employers not specifically exempted should come under the provisions of the act; however, agricultural and domestic workers probably would not be included and employers of fewer than four or five workers would be exempt. As to the coverage of injuries, the new law would provide certain compensation for accidents that arose out of and because of the job. A minority of the states give benefits for all occupational diseases, while more than three-fourths provide compensation for some or all diseases. Therefore, the new law probably would carry provision for

<sup>9</sup> The only appreciable trend in the postwar period was to liberalize the laws somewhat through greater coverage and larger benefits. This was not a new trend, but rather an acceleration of a development that was under way before the war.

compensation of some occupational diseases, but not all. In following other states, the new law would provide no compensation for the first seven days time lost because of injury.

The section of the law dealing with benefits would provide weekly payments of roughly two-thirds of the average weekly wage, with a maximum of \$18 to \$20. In case of loss of life or of some permanent disability, such as the loss of a hand or an eye, there would be provision for a set number of weeks of benefits, perhaps 250 weeks benefits for the loss of an arm, for example. Perhaps some provision would be made for the rehabilitation of injured workers, but the provisions on this particular point are likely to be weak.

The law would make some provision for medical treatment. If it followed recent trends, there would be no limit on the amount of medical care or the period of time in which it could be given. However, the state would have ample precedent for limiting the time in which benefits could be paid or the monetary value of the medical benefits.

If the state followed the majority of current laws, provision would be made for the creation of an administrative commission or board to apply the law. There would perhaps be some provision for the prompt reporting of accidents so that the machinery for payment of claims could be started. Although such a provision would be an entirely desirable one, the law could follow considerable precedent by leaving such matters to the discretion of the administrative body. There would be other provisions, and all the matters outlined above would be spelled out in some detail. However, the law of the newly converted state would, if typical of its counterparts, be essentially as outlined.

#### Variations in compensation laws

With this hypothetical law as a basis for comparison, let us note the variations in the laws now on the statute books. As to the types of workmen's compensation laws, two matters should be noted: whether the law is compulsory or elective, and what provisions are made for carrying the insurance required under the acts. A compensation law is said to be compulsory if every employer within the scope of the act is required to accept the act and pay the specified compensation. A law is elective if the employer is allowed to accept or reject the act; if he does not choose to come under the coverage of the act, however, he loses the right to escape suit under the common law defenses of contributory negligence, fellow servant negligence, and assumption of risk by the employee when placed on the job.

None of the compensation laws covers all employments; agriculture, domestic service, casual employment, and, in some states, non-



hazardous employments commonly are exempted from the acts. In most states the non-covered occupations may be brought under the acts by employer acceptance, but failure to do so does not deprive the employer of the common law risks. As of June, 1946, 26 laws in the United States were compulsory only in hazardous or listed industries, for example.<sup>10</sup> One state allows employees to reject coverage if they prefer to take their chances on a suit for damages; several states that have compulsory laws permit election or rejection of coverage by employers of small numbers of persons.

As to the type of risk protection provided, the laws vary widely; only eight laws<sup>11</sup> require insurance with a fund carried exclusively by the state. Eleven other laws provide for state funds, but allow a choice between that fund and other types of insurance. There are fifty-four compensation laws enacted by the states, federal territories, and by the federal government for longshoremen and civil employees; of this number, forty-seven laws permit insurance under other plans than the exclusive state fund. The majority of these laws permit insurance with private casualty insurance companies or self-insurance. If an employer desires to self-insure he must give proof to the state of his financial ability to meet obligations for the compensation of his injured workers. Forty-three laws allow either self-insurance or insurance with private concerns.

The coverage by the laws varies widely from one state to another. There are, however, many persons excluded in every state; altogether, the federal Department of Labor estimates, one-half of all gainfully employed workers are protected by compensation laws. The common exclusion of farm labor, domestics, and casuals was mentioned above. In addition, twelve states make their laws applicable only to listed hazardous industries.<sup>12</sup> Although some of the lists of hazardous industries are comprehensive, such laws generally do not offer as much protection as those with blanket coverage of all not specifically exempted. This limited type of law is a remnant of the days when it was difficult to get laws enacted and constitutionality was still held questionable. With constitutionality assured, there is no apparent valid reason for continuing such laws.

<sup>10</sup> The statement of post-World War II workmen's compensation laws relies heavily on two bulletins of the Division of Labor Standards, U. S. Department of Labor. These bulletins, published by the U. S. Government Printing Office, are: No. 62, *Principal Features of Workmen's Compensation Laws as of September, 1943*; No. 78, *State Workmen's Laws As of June 1, 1946*. Recent information was taken from the article "State Workmen's Compensation Legislation." *Monthly Labor Review*, October, 1947, Vol. 65, No. 4. Where other sources are used they are cited.

<sup>11</sup> Nevada, North Dakota, Ohio, Oregon, Washington, West Virginia, Wyoming, and Puerto Rico.

<sup>12</sup> Illinois, Kansas, Kentucky, Louisiana, Maryland, Montana, New Mexico, New York, Oklahoma, Oregon, Washington, and Wyoming.

Another type of exemption utilized under a majority of the laws is the failure to cover employers of fewer than a specified number of workers. Such exemptions are made in thirty-one laws and range from exclusion of employers of fewer than two workers in one state to fewer than fifteen in another. The most frequent exemptions are of employers of fewer than three, four, or five employees.<sup>13</sup> Probably the reason for this type of exclusion in many of the acts is the administrative problem of applying the law to very small employers. However, the exemption of employers of eight or ten people will make for a very sizable exclusion from the protection of the law.

Public employees do not usually enjoy good compensation laws. Federal employees all are covered by a compulsory compensation law; not so in some of the states and subdivisions. In eleven states all public employees are covered, and twenty-one laws cover all public employees except elected officials and administrative officers. In eight states only those public employees who are in hazardous or listed occupations are included. Six state laws do not cover state employees.<sup>14</sup> Although the record is not satisfactory, public employees of the nation probably are more generally protected than private workers.

#### Disability compensation and amount of benefits

Not only is the numerical coverage of workers of importance, but the types of industrial disablement that are covered is also significant. As has been pointed out, the early laws all were enacted to compensate for industrial accidents only. Today all compensation laws provide compensation for accidents, but not always for all accidents occurring on the job. Since the laws are to provide compensation for injuries arising out of and in the course of employment, most laws exclude injuries resulting from intoxication or willful misconduct or gross negligence of the worker. Except for this type of exclusion, however, all accidents in covered industries are compensable.

The situation is not so adequately taken care of in the compensation of occupational disease. If the purpose of workmen's compensation laws is to provide for prompt and regular payment of benefits to injured workmen, then this practice is a serious omission;

<sup>13</sup> Alaska, Arizona, Delaware, Florida, Kentucky, Ohio, Puerto Rico, Texas, Utah, and Wisconsin exclude those employing fewer than three; Colorado, Massachusetts, Nevada, New Mexico, New York, and Rhode Island, those employing fewer than four; Arkansas, Connecticut, Kansas, New Hampshire, North Carolina, and Tennessee, those employing fewer than five.

<sup>14</sup> Missouri excludes public employees; Alabama, Kansas, Mississippi, and Texas laws do not cover state employees; the law of New Hampshire allows compensation similar to that of private employment only by action of the governor.

it is clear that diseases arising out of the work which a person does are as harmful to the body as the sudden unfortunate move that results in a strained back, a crushed hand, or the loss of an eye. As we know, however, compensation of persons suffering from occupational disease has come much more slowly. In 1946 there were fifty-three workmen's compensation laws in states, territories, and federal jurisdictions; of these, thirty-nine state laws, those of the District of Columbia, Hawaii, and Puerto Rico, the federal employees' act and the federal act covering longshoremen provided varying degrees of protection against industrial diseases.

The coverage of diseases varied from full coverage of all diseases in sixteen states, the District of Columbia, Hawaii, and the two federal acts, to protection only against silicosis in the state of West Virginia. However, in most of the seventeen states and Puerto Rico that provide compensation for a list of diseases the group is much more extensive than in West Virginia, some of the state laws listing thirty or more diseases for which compensation is granted. In most cases where compensation is granted for disease the payments for death, disability, or lost time are the same as for accidents. In the case of silicosis and other dust diseases, however, benefits are limited. Benefits in a dozen states are denied for these illnesses, except for total disability.

Since the compensation laws were passed in order to provide to an injured workman unable to earn a living some cash income during his disability, or for a specified period of time, the benefit provisions of the acts are of great importance. In this subdivision of the laws there are a number of different problems to meet: payments to be made in case of temporary total disability, such as a broken arm, that makes a worker unable to work for a time but from which he recovers completely, payments to be made for permanent partial disability, such as the loss of a hand or eye, leaving a man impaired in his abilities but able to do some types of work; payments to be made to a person who is so injured or diseased as to be permanently unable to earn a living; and payments to be made to survivors in case of the death of a workman.

If a person suffers an accident that incapacitates him so that he cannot work, medical and hospital benefits are to be provided at once. Not so with monetary benefits; these are payable immediately in only one state. In all other states there is a waiting period of from one to ten days. However, in thirty-five states subsequent payment is made for the waiting period if the disability ranges from one week in three states to seven weeks under four laws. Generally, the laws containing provisions on this subject specify about four weeks, although there is no clearly typical period.

Once the appropriate papers have been filed, the waiting period elapsed, and the wheels of government have made the proper number of revolutions, what are the monetary grants that an injured person may expect? A common figure is two-thirds of the average wage with benefits based on the average wages prior to the injury. Percentile allowances range from 50 to 70 per cent, with a heavy concentration around 65 to 66% per cent. Nearly all states set minimum and maximum allowances in dollars rather than in percentages. Minima range from \$5 to \$15, with \$7 or \$8 being common figures. Maxima run from \$11 to \$32 with figures of \$20 to \$25 being common. In addition, most states provide for a maximum period of payments for temporary total disability, the maximum time varying widely from two to ten years. A majority of the states also fix maximum monetary payments that are allowed for such disabilities, the maxima ranging from \$3750 to \$10,000.

In examining compensation provisions from the least to the most serious injuries, the next matter to be noted is that of compensation for specified injuries. To compensate for an injury that results in permanent partial disability, such as the loss of a hand or the sight of an eye, almost all laws provide for a certain number of weeks of benefits for each listed injury. The weekly grants are computed as are those for temporary total disability and are in addition to medical aid. The benefits allowed for a certain injury vary widely from state to state. The loss of the hearing of one ear, for example, warrants no benefits under fourteen laws and ranges up to 125 weeks of payment in one law; normally forty to fifty weeks are granted. Nine states provide no compensation for loss of hearing in both ears, whereas one state allows 499 weeks of benefits. For the loss of a hand permitted benefits range from 104 to 333 weeks. Allowances for every other listed injury vary as widely as the above examples. In no law is allowance made for the extent to which an injury may impede a worker's opportunity to follow his chosen profession. None considers, for example, the fact that the loss of a hand would be a severe handicap to a carpenter but, from the standpoint of ability to continue in his field of specialty, it would not be a damaging handicap to a teacher.

Not all injuries fit into the categories for which allowances are made in the laws. A person might suffer a compound injury causing complete loss of some function and partial loss of others. The injury fits no classification, yet compensation is due. For cases of this nature the administrative agency of the law must decide the amount of compensation due.

In thirty-three laws the allowances provided exceed the payments made while the worker was totally disabled. For example, it would

take a person some time to recover from the loss of a hand; under these laws he would be paid his regular weekly benefits until he was judged to have recovered from his injury; then his allowance for the loss of the function or member would start. In the other state laws the allowance made for the injury is the total, other than medical or hospital benefits: the payments during total disability are a part of the grant allowed. In eight states additional amounts are allowed for vocational rehabilitation. Some also allow extra payments for disfigurement.

Compensation for permanent total disability is a problem that must be faced in the laws, but such injuries are not so common as any of the other classes of disability. It was estimated that in 1945 there were only 1800 permanent total disabilities suffered in industrial accidents as compared with 16,000 deaths, about 90,000 permanent partial disabilities, and nearly 2,000,000 lost-time accidents.<sup>15</sup> However, such accidents happen often enough to necessitate legislative provisions to cope with them. Nearly one-third of the laws in 1946 met the problem by granting benefits for life to those permanently and totally disabled. In the other laws limitations were imposed by setting either a maximum amount that could be paid in benefits, ranging from \$5000 to \$12,000, or a maximum period of time during which benefits could be paid, the maxima ranging from 260 to 1000 weeks. In computing weekly benefits the same method is used as for temporary disability: a percentage of the average weekly wage, usually 65 or 66% per cent, is allowed, with statutory minima and maxima. A considerable number of the laws adjust the maximum upward for persons with dependents, but such provision is not typical.

Another somewhat difficult situation is the provision of benefits for second injuries. An example will show the problem. A worker loses one arm in an accident, but on his recovery he is placed on another job in the plant that he can perform despite his disability. At a later date he suffers the loss of the other arm. For the second injury should the man receive compensation only for the loss of an arm, or should he now be compensated for total disability? Clearly, the loss of the second member of the body was more severe than the loss of the first. If an employer were required to pay the cost of compensation that resulted from the combined injuries, it might be a serious enough financial burden to cause him to refuse to hire handicapped persons.

Some state laws make no provision for payment for second injuries other than the compensation normally due. However, thirty-eight

<sup>15</sup> *Monthly Labor Review*, September, 1946, Vol. 63, No. 3, p. 391.

laws, thirty-three states and Alaska, District of Columbia, Hawaii, Puerto Rico, and the federal Longshoremen's Act, made some provision in 1946 for compensating second injuries on the basis of the combined disability resulting from more than one accident; four more states enacted similar provisions during 1947, as did Mississippi in 1948. This called for the establishment in most states of some fund from which the excess charges necessitated by the more expensive combined injury compensation could be drawn. The financial arrangements backing these funds varied widely.

All the state compensation laws cover minors who are legally employed. For those illegally employed, however, there is a variety of provisions. Eight states do not cover minors who are illegally employed while sixteen provide for extra compensation in the same type of cases. In twenty-two laws illegally employed minors are to be compensated on the same basis as other persons.

Some difficulties arise over the compensation of aliens. The laws make no distinction in grants for resident aliens. However, non-resident dependents of aliens are handled differently in thirty-four state laws and in the laws of the territories and those for federal civil employees and longshoremen. Five states exclude payments to non-resident alien dependents, five others put them on the same footing, and nine do not mention them. In the other laws there are various provisions distinctive from those for resident or non-alien dependents that provide for reduced benefits or for restricting the possible beneficiaries to whom benefits may be paid. Other laws provide for reduced lump-sum payments to such dependents.

Occasionally a problem presents itself when a person hired in one state is injured in another. What state law covers his injury? In thirty-one states the laws apply under certain specified circumstances to accidents occurring outside of the state. Usually the hiring contract has to be made in the state and the employer's business be there. In some cases courts have ruled that state laws not so specifying apply to out-of-state injuries. Although there are exceptions, the generalization can be made that in most instances an out-of-state accident can be compensated in the state in which the contract of hire was executed and in which the employer's place of business is located. There are instances, however, where special or unusual circumstances alter the situation and damage suits might have to be brought if employers were unwilling to settle.

Finally, there is the problem of compensation for death of a workman resulting from industrial causes. In a majority of the state laws a certain number of weeks of benefits or a certain maximum sum of money is permissible because of the death. Most of the laws base benefits on previous wages but four states pay flat pensions. Unlike

benefits for other injuries, however, the size of weekly benefits, that is, the percentage of average weekly wages granted, varies with the number of children of the widow or other dependents.

Only eight laws allow benefits to the widow for life or until remarriage and to dependent children until they reach a certain age. In the other laws, except that of Oklahoma which pays no death benefits, maxima in terms of time or sums of money are set. Frequently, payments to the widow are discontinued on remarriage; those to children on reaching eighteen or on marriage if prior to that age. When there are limitations set on the period of payments—twenty-four laws so provide—it is common to deduct the period in which disability benefits were paid to a worker who was not killed outright by an accident. Few of the laws make provision for adjusting the sum of death benefits on the basis of the age of the deceased worker; some adjustment is made in the laws paying benefits to a widow for life if she does not remarry. To some extent, the variations found in some of the laws raising the maxima for dependents and extending payments to dependent children up to eighteen years of age amount to variation that will correlate somewhat with age. All in all, variations in extent of dependency are not adequately handled in the laws.

### Administering the compensation laws

In most of the state laws provision is made for a special board or commission to administer the claims arising under the act. In all except five states<sup>16</sup> there are commissions to judge the claims of the injured. Several methods have been devised for handling claims under the commission system.<sup>17</sup> In general, these plans are to hold hearings for the purposes of determining compensation for each injury, allowing agreement between worker and employer on compensation, subject to commission approval, and allowing direct payment by the insurance carrier to the injured, subject, again, to the approval of the commission. Any one of these types of administration is better than the archaic policy, followed by the five states noted above, of resting the administration of all claims in the courts. Such a plan, or lack of one, results in virtually no supervision, except in contested cases that are appealed to the courts.

Whatever the plan of compensation, not all injured workers will feel that they are adequately compensated by the settlement first proposed. Therefore, some system for appeal of cases must be

<sup>16</sup> Alabama, Louisiana, New Mexico, Tennessee, and Wyoming leave the administration of the laws in the hands of the courts.

<sup>17</sup> For a discussion of these methods see: U. S. Bureau of Labor Statistics, Bulletin No. 672, *Problems of Workmen's Compensation Administration*, Ch. 7. Washington, D. C.: U. S. Government Printing Office, 1940.

created. Although an appeal machinery is necessary, it is estimated that over eighty per cent of all cases are settled in a routine manner and without appeal.<sup>18</sup> Most states will have some machinery for appeal to the commission that administers the act or else a special committee to hear appeals. This is not true of the states that have court administration. As a final resort no matter what the state, an aggrieved worker has a right to appeal to the courts a claim that has not been settled to his satisfaction. In view of the time and expense involved in such appeals, it is doubtful if the majority of them are worthwhile for the worker.

#### Evaluation of compensation laws

Such, then, are the workmen's compensation laws of the states, territories, and the federal government. How adequately do they perform their functions? Any comments on this question must be tentative because of the great variation in the laws; in addition, the quality of administration of any law, good or bad, can do much to make or break it. In general, however, none of the laws is completely adequate. To be entirely adequate a law would ensure the prompt payment of monetary benefits, in addition to medical and hospital care, to persons injured on the job. The question of who is at fault should not be considered. The basis of this argument is that employers should be required to make financial provision for the protection of their workers against accidents just as they provide for the repair of machinery or other equipment. Such protection should be a part of the cost of production.

In the following comments on workmen's compensation laws the assumption is made that the laws are and should be a type of social insurance. As such, the primary purpose of the laws must be to extend aid to those in need; the provision of the laws, the methods of administration, and the financial problems should all be surveyed with the question in mind, "How does this affect the basic purpose of workmen's compensation: providing aid to injured workers?"

With regard to coverage, the laws clearly are far from adequate; attention has been called to the estimate that only about one-half of all those gainfully employed are covered by workmen's compensation. In almost all states the exclusion of domestics, casuals, farm labor, and small employers is a serious omission. In addition, two relatively large groups that are not protected are interstate transportation workers and maritime workers. These two groups would require coverage by federal laws; at present the Federal Employers' Liability Act only restricts the employer's ability to escape damage

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<sup>18</sup> *Ibid.*, p. 122.



suits through the common law defenses. In addition, many states that offer protection only to workers in listed hazardous occupations exclude workers who need coverage; even in non-hazardous industries accidents and sickness occur.

If the goal of workmen's compensation is to provide protection for all or as many workers as possible, many of the present exemptions should be removed. Laws should be general coverage laws rather than "listed industry" enactments. In view of the laws existing in most states, numerical exemptions of employers of more than four workers do not seem necessary. Coverage of agricultural or domestic workers should be provided under the same conditions as for other industries. In addition, railroad and maritime workers should be given protection.<sup>19</sup> A final point on coverage is that all laws should provide protection for out-of-state accidents. Most states do so but not all.

To ensure the coverage of all workers all laws should be compulsory. There no longer is need of toning down compensation laws to ensure constitutionality. Even though under elective laws common law defenses are not available to employers, compulsory laws have the additional advantage of more prompt, definite, and certain payment of benefits. There seems now to be no good reason why all laws should not be compulsory.

In the coverage of injuries the greatest weakness of legislation has been the failure of many states to protect workers against occupational diseases. Those states that do provide some such protection do so only for listed diseases rather than for all. Although it is difficult to determine in some cases whether a disease is occupational, that administrative problem should not prevent the coverage of all occupational diseases. Laws that do not extend full protection for all occupational diseases are not satisfactory. All injuries, whether accidents or diseases, that arise out of the job should be compensable under an adequate state law.

The provisions in the laws for waiting periods are generally satisfactory. Administratively it would be a very difficult task to compensate for every lost-time injury. Although one state does so, compensation of injuries causing less than three days lost time would seem unwise; and waiting periods of more than seven days should not be imposed on the worker. Almost all laws come within these limits. Most provide for payments retroactive to the date of injury if the disability is extended. Where such is not the case,

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<sup>19</sup> For an evaluation of the present workmen's compensation laws see: Division of Labor Standards, U. S. Department of Labor, Bulletin No. 70, *How Good Is Your Workmen's Compensation Law?* Washington, D. C.: U. S. Government Printing Office, 1944.

laws should be revised to give such protection for all disabilities of more than two or perhaps three weeks.

The justice and adequacy of benefit payments do not merit an evaluation as favorable as that in the preceding paragraphs. There are many points at which the benefit provisions fall short of need. In cases of temporary total disability, the payment of less than full wages is in itself debatable. But if full wages were paid, the problem of malingering might be severe. On the other hand, the expenses of the family of an injured person do not decline during the disability; in fact, there may be additional expenses even though medical costs are borne by the compensation agency. The issue then becomes one of whether the compensation is to support an injured person and his family or to give aid during the time when a regular income is stopped. Most persons probably favor the idea of aiding rather than supporting at the level existing prior to the injury. Even so, benefits of only one-half of the pre-injury wages are too low. Two-thirds to three-quarters of pre-injury wages should be allowed. Many states meet the suggested two-thirds; none, at present writing, the three-quarters.

In most states today the statutory minima and maxima are unreasonably low; in fact the statutory maxima are so low that many an injured worker in 1947 or 1948 would receive half or even less of his average wages, even though the law supposedly allows 65 or 66% per cent of his wage. The recipient of benefits receives the stated percentage of his wages only if the sum falls between the permissible minimum and maximum. And for the average industrial worker of the late forties who lives in an urban area with a family, a maximum grant of \$20 or \$25 per week amounts to aid to the family and not to enough for support. On the assumption that benefits should be sufficient to support a family during the disability of the breadwinner, most of the laws should be revised to raise the maxima or remove them. Statutory limits of as little as \$15 in some states are far out of step with post-World War II price levels.

Another matter arising out of the payment of benefits is the duration of the compensation period. As was pointed out, many laws do not provide unlimited benefits for persons who suffer permanent total disability; a majority of the states place a maximum either on the amount of money that can be paid in such cases or on the number of weeks of benefits or both. Keeping the social insurance principle in mind, there is no reason why a permanently disabled workman should not be compensated for life. A compensable injury arises out of and because of the job; if that be the case, a worker should not be thrown unsupported on the industrial scrap heap. The same philosophy may be applied to the compensation of de-

pendent widows and children. Where widows or children are dependent on a worker killed in an industrial accident, it is reasonable to expect, many state laws to the contrary notwithstanding, that compensation should continue during widowhood or life and until the children are at least eighteen years of age or married. The limit should be extended beyond age eighteen in the cases of children who are handicapped in some way.

All laws should provide a fund from which the excess cost of second injury compensation can be met. Since a heavy majority of the laws make such provision, this point need not be labored. Essentially, the same is true of the compensation of illegally employed minors. Although most states provide as adequate, if not better, compensation for illegally employed minors than for other persons, the eight states deficient in this respect should modify their laws to comply with normal practice.

Allowable medical benefits cannot be viewed so optimistically. Twenty-three laws limit in one way or another the medical benefits that a worker may be granted. Some states impose maxima in terms of the value of medical services that may be claimed, the amounts varying from \$75 to \$800. Other laws allow benefits for no longer than four weeks, while others set limits up to one year. Some laws impose a double time and monetary limitation. Again, those who believe in workmen's compensation as a social insurance cannot agree to any limit on the amount of paid medical care necessary for the industrially injured worker. The twenty-three limited laws all should be rewritten to provide for full medical care. Along with full medical care, every law should provide for free artificial appliances and free vocational rehabilitation for those who are permanently partially disabled.

Finally, there is the broad field of administration of the acts to examine. It is hard to overstress the importance of administration in determining exactly what a law will mean to workers. There will be a great difference between the benefits of two similar laws, one administered by men with the idea of providing a maximum of social protection and another by persons with the idea of keeping down the costs of the service. As a first step in adequate administrative procedure, the few remaining laws that stipulate administration by the courts should be amended to provide for administration by a commission. To aid in establishing an adequate administrative agency, the laws all should have strong provisions requiring the prompt reporting of accidents so that the benefit machinery can be set in motion. The laws might well include the relatively rare requirement that first benefit payments be made within a certain set period of time after the injury. In view of the length of time

elapsing before first payments under many of the laws, some such protection is needed.

Where private insurance carriers and self-insurance are allowed, there have been cases of lump-sum payments that close out a disability claim before it is certain that the extent of disability is known. All laws should provide that lump-sum payments be made only with the approval of the commission, which should ascertain by hearing that the proposed settlement is just and in the interests of the injured person.

The proponents of workmen's compensation are faced with the fact that in most instances the staffs administering the laws are inadequate. Salaries paid, like those of most public servants, are so low that it is difficult to obtain and hold competent officers. This situation is not peculiar to the administration of workmen's compensation; however, in view of the extreme complexity of many of the problems that arise, especially in terms of extent of disability, the situation is perhaps especially acute. Many state laws should be amended to dispose of archaic salary schedules. Although a relative degree of security for those on civil service will compensate in part for lower salaries, there is a limit to the substitutability. In connection with the matter of salary-scale limitations, there is another personnel problem. Workmen's compensation administrations should not be staffed by persons whose attitude is one primarily of maintaining large liquid funds, in case of state funds, or of keeping down payments. Holding payments to a minimum is excellent if it is done by virtue of few accidents. But, although it is difficult to hire on the basis of an attitude, persons administering workmen's compensation laws should be those who understand and are sympathetic to the primary purpose of supplying an income to persons who suffer disabilities arising out of their work. This does not mean that the primary purpose of compensation laws is to give away state funds or the funds of the carriers; it does mean that compensation of injuries must be considered above the cost of the benefits that are paid.

Other administrative problems that exist concern the degree of autonomy of the commission and methods of ensuring the security of payments. The latter problem is of especial importance where self-insurance is allowed, but it has occurred in the 1930's with private insurance companies too. One means of meeting this difficulty would be more careful specification of adequate self-insurance rules. Another would be to establish some sort of special guarantee fund from which injured workers could be compensated if the self-insured company or the private insurance firm proved unable to meet its obligations.

The degree of autonomy in rule making and application of the law is a difficult problem. If it be assumed that adequately trained and interested administrative officers will be in charge, then a high degree of autonomy for these officers would be desirable. On the other hand, those in charge of applying the law may be so inept that it would be better if their activities were closely circumscribed by the law. Probably the only adequate solution is to make possible, through salary and other job conditions, the hiring of qualified administrative personnel. In that case, the recommendation of the Division of Labor Standards that there be "clear and ample delegation of the rule-making power to the administering authority" can be endorsed.<sup>20</sup>

### Non-industrial injuries

If a worker must suffer injury or illness, he is less unfortunate should he suffer an industrial accident or disease than a non-industrial one. In the United States society has, for all practical purposes, refused to recognize the problems of general illness and accidents as a fit subject for social protection. No claim for general illness or non-industrial accidents can be made under workmen's compensation laws because the disability has not arisen out of and as a result of the work being done. And in all except three states<sup>21</sup> the worker so disabled can claim nothing under the unemployment compensation laws because any such payments are contingent to the worker being ready and able to take work. Clearly, a person who is sick or disabled by accident cannot qualify.

That the need for social protection by many of those who are ill or disabled by non-industrial causes is a serious problem has been recognized and acted upon in many other countries. Attention has been called in Chapter III to the earlier development of social legislation. The pioneer experiments of Germany in the 1880's grew rapidly, and it was reported that as long ago as 1935 twenty-two nations, mostly European, had compulsory health insurance plans; thirteen of the laws were reported to cover "practically all persons doing paid work in the service of others."<sup>22</sup>

Recognition of the problem has not been entirely lacking in this country, but unfortunately this recognition has not been by the groups that count most. But the need is omnipresent. Commons and Andrews estimated in 1936 that general, non-industrial illness

<sup>20</sup> Division of Labor Standards, U. S. Department of Labor, Bulletin No. 70, *How Good Is Your Workmen's Compensation Law?*, p. 10.

<sup>21</sup> Rhode Island, New Jersey, and California. See below, Ch. XVIII, for discussion of the expansion of the unemployment insurance plans of those states.

<sup>22</sup> Commons, J., and Andrews, J., *op. cit.*, p. 260.

caused absence of eight days per year for the average worker. Accidents would add somewhat to this figure. This loss is much greater than that for industrial disability; even with the statistical allowance of time lost for injuries and death far in excess of the days actually lost in the year in which a disability occurred, the time lost from industrial accidents would have averaged perhaps five days per person for the wartime work force.

The unfortunate situation is that a disproportionate part of general sickness befalls workers and their families. The poorer living conditions and diets and less adequate medical attention, especially preventive medicine, spells higher incidence of disease. Thus, the problem is in a real sense a labor problem, and any legislative solution would merit consideration as labor legislation. Unfortunately, there is in this nation little action to discuss. That there should be action does not seem a debatable question. An infinitesimal part of all sickness is self-induced, unless that which results from ignorance of or inability to practice reasonably healthy living habits may be so classed. Whether or not those who were ill were at fault in most cases, if they were financially able to withstand the loss of income and extra expenses of a period of illness, then government action might not be so clearly justified. But neither of these conditions is true.

The approach of European nations, virtually all of which have in the past sixty years adopted some sort of governmentally financed or subsidized health insurance plans, has been to provide through the government program some compensation for the loss of wages as well as medical benefits. Many of the plans also provide for maternity and burial benefits, but these are not so common as the other provisions.<sup>23</sup>

The problem of public health was recognized by some persons in this country before the first World War. As early as 1912 the American Association for Labor Legislation named a committee to study the problem; their first report in 1913 and subsequent reports in the next few years aroused some interest, and between 1915 and 1918 a number of states introduced health insurance measures or named committees to study the problem. Nothing came of this flurry of interest; since that time, however, there have been periodic revivals of interest and of attempts on a state or national basis to encourage some plan of socialized medical service or health insurance program.

To date, the opposition to such plans has been sufficiently strong and well-organized to stop any governmental action. Certain mild

<sup>23</sup> For an excellent brief survey of foreign health insurance plans see: Millis, H. A., and Montgomery, R. E., *op. cit.*, Vol. II, Ch. VI.

substitute measures have been developed in various parts of the country, such as group hospitalization plans and a relatively few cooperative health associations that provide general medical service and a specified amount of hospital service for their members only. There also have been developed health and welfare plans by employers, unions, and by employers and unions working jointly. The coverage of the latter type of plan is relatively limited but is likely to expand unless there is an extension of government health protection.<sup>24</sup> In addition, there have been some instances of private groups of doctors establishing or becoming a part of a medical association or clinical organization that provides general medical service at relatively low, fixed monthly charges to members of the association, but, in this case also, the attention is available only for those who can pay for it. There is also a considerable number of persons with low incomes who receive charity medical attention; this number was estimated at from 10,000,000 to 15,000,000 in the late 1930's.<sup>25</sup> Finally, there is a considerable amount of public health work carried on by federal, state, and local governments. These activities, however, do not center on general sickness. They are concerned primarily with providing for the mentally unbalanced, for the control of communicable diseases like tuberculosis, for public school health programs, and the like. All of the above are desirable, but they represent a patchwork of uncoordinated efforts that leaves much to be desired.

A program that copes adequately with non-industrial sickness and accidents must do certain things that have not been done to date in this country. The plan should cover all workers and their families; secondly, it should make provision for medical and hospital service and for an income for the incapacitated worker during the time that he is unable to work; and finally, it must be so established that inability of an individual to bear his part of the costs will not prevent participation in the program. Certainly the cost of service should not be passed on to the individual. Let us note each of these points in brief.

An adequate approach, legislative or otherwise, to the public health problem must cover all workmen and their families. To date, the individual efforts of the various health associations and other groups working in the field have not done this, nor are they likely to do so. It will require governmental action that sets a uniform policy for all persons within the particular governmental unit to do this. Widespread development of cooperative or other health plans that provide medical service on a fixed-fee basis will never

<sup>24</sup> *Monthly Labor Review*, February, 1947, Vol. 64, No. 2, p. 191.

<sup>25</sup> *Ibid.*, p. 259.

cover all the population. Failing that coverage, some of the illnesses that occur will present the same type of problems as the majority of them do today.

With regard to the provision of an income for the breadwinner during disability, this need is not met by any of the group medical association plans. The problem of illness to the normal wage earner of the family is no more, if as much, the problem of medical expenses and suffering than it is the loss of income on which the family is dependent. Although private insurance companies will write for those who can afford them disability insurance policies that give an income during illness, this does not answer the need of the majority who are unable to buy such protection. It seems clear that the bulk of compensation for involuntary idleness due to sickness must come from society through some governmentally established program.

The final point made above is, in essence, that the protection provided must be social insurance. That is, the necessary benefits that are paid must not be contingent on each individual bearing an equal share of the burden. The keynote of an adequate solution to such a problem must be protection supplied to all who need it, the costs financed without reference to the benefits that any individual derives. Thus, under such a plan, any supporting taxes collected from workers might well be a specified percentage of income. In addition, a tax might well be levied on the payroll of the employer, who might not benefit directly from the law. Such a plan might even be put into effect and supported from general revenues, no special tax being provided for support. It is doubtful, however, if a law calling for as much expenditure as would be involved in this law would be enacted without provision being made for raising funds to support the drain on the public treasury.

To summarize, workmen's compensation is the oldest form of social insurance in the United States. It developed as a method of providing medical aid and some maintenance income for those disabled by the work which they do. Although most of the states have gone through the motions of providing a minimum of protection for the industrially injured, probably only about half of the gainfully employed do have coverage. In addition, the reluctance of most state legislatures to spend any money that can possibly be saved has created a reluctance to broaden coverage, and especially to extend coverage to occupational disease.

General illness and non-industrial accidents cause more lost time than do industrial disabilities, and the bulk of these two falls on worker groups. However, this problem has virtually been ignored. Studies have been made and bills introduced, but effective opposi-



tion has prevented the development of any sort of health insurance program. In only three states can a worker claim any sort of compensation for loss of income due to non-industrial disability. This is probably the greatest gap in our rather limited program of social insurance.

### Questions

1. Under the provisions of the Constitution, could the federal government enact industrial accident- or disease-compensation laws for workers in mining, manufacturing, and other such industries?
2. Would a federal law be likely to be an improvement over existing state compensation legislation? What are the pros and cons of federal legislation on the subject?
3. What are the most outstanding weaknesses of current workmen's compensation legislation? To what extent are corrections of these weaknesses practical?
4. If disability compensation for non-industrial accidents and disease were undertaken, who should be expected to bear the cost? Employers? Workers? The public? Or some combination? Why?
5. What are the strong points and weaknesses of merit rating as a basis for setting rates of workmen's compensation?
6. What reasons can you offer for workmen's compensation having been the earliest form of social insurance developed in the United States?

## CHAPTER XI

### REGULATION OF HOURS OF WORK

#### Pre-World War I regulations of hours

Much of the story of the regulations of hours of work was completed prior to the first World War, and was surveyed in Chapter VIII. By the time of that war it was clearly established that the states could exercise police power to set maximum hours of work. It will be recalled that in a number of rulings the federal High Court validated several types of laws. In *Holden v. Hardy*, in 1898, it approved the regulations of hours of work for men engaged in hazardous occupations; in 1905, however, in *Lochner v. New York* it denied the power of the state to regulate the hours of bakery workers because such work was not hazardous. *Muller v. Oregon*, in 1908, established the right of the state to set maximum working hours for women even though there be nothing especially hazardous about their work. Finally, in 1917, in *Bunting v. Oregon* the Supreme Court approved the power of the state to regulate the hours of men as well as women in general manufacturing.

In addition, hours of work could be set for the employees of state and federal governments and of contractors supplying goods to government agencies. And where long hours might endanger public safety, as in transportation, the length of the work day could be regulated. All in all, therefore, at the end of the first war state regulation of hours was well established, but the federal government had nothing in the way of general regulation of hours for all workers. As usual under state regulations, there were wide variations in the number, type, and effectiveness of controls.

#### Prohibition of night work

One type of control of hours of labor was given the approval of the Supreme Court after the war. About a dozen states have included in their maximum-hours laws some prohibition of night work. These prohibitions normally forbid work between 9:00 or 10:00 P.M. and 6:00 or 7:00 A.M. Usually they apply to all women; sometimes only to females under eighteen.<sup>1</sup> Such a law had been declared

<sup>1</sup> See Prentice-Hall's *Complete Labor Equipment*, Vol. 3, *State Labor Laws*, for summaries of these laws.

void and later reconsidered and validated by the New York Court of Appeals<sup>2</sup> prior to the time that it was considered by the federal Supreme Court.

In view of the language used and the conclusion reached, it is somewhat surprising that Mr. Justice Sutherland delivered the opinion of the Court in the case of *Radice v. New York*.<sup>3</sup> The statute, which forbade the employment of women in restaurants in cities of more than a specified size between 10:00 P.M. and 6:00 A.M., had been attacked on two counts. It was said that it was in violation of the fourteenth amendment because it conflicted with the due process clause by taking from employer and employee their freedom of contract. It was assailed also as a denial of the equal protection of the law because it did not apply equally to all workers. The man who one year earlier had been unable to approve of the establishment of minimum wages for women and, indeed, expressed that opinion in the mid-thirties was able to see the law in question as a reasonable exercise of the police power.

As to the deprivation of freedom of contract, it was held by the Court that, whatever the limitation on individual liberty, the law was defensible due to the hardship on women and on society as a whole of night work by women. The difference in the physical structure of men and women and of "the functions to be performed by each" were cited to prove the validity of the restriction. It was denied that the Adkins case of the preceding year applied in any way, since the issue in that case was "a wage fixing law, pure and simple."

The Court denied that the classification of women to whom the law applied was sufficiently arbitrary to validate the argument that there was a denial of the equal protection of the laws. This conclusion was somewhat surprising since the law applied only to certain classes of women employees in restaurants and not at all in hotel dining rooms or in lunchrooms; in addition, it applied only to certain classes of cities, the classification being based on size. In the opinion of the Court, every classification must be somewhat arbitrary and have some degree of inequality of treatment. However, since the classification of the law was not "actually and palpably unreasonable and arbitrary," it was not to be condemned.

The *Radice* decision is not of great importance. In the first place, it did not change the foregoing decision of the New York Court of Appeals. Secondly, it has not resulted in a widespread enactment

<sup>2</sup> The law was invalidated in *People v. Williams*, 189 N. Y. 131 (1907); it was validated by the same court eight years later on reexamination, *People v. Schweinler Press*, 214 N. Y. 395 (1915).

<sup>3</sup> 264 U. S. 292 (1924).

of such laws. In 1948 roughly one-quarter of the states had such laws, a few applying only to females under eighteen years of age and others restricted to certain industries, so this type of protection is relatively inadequate. The decision is of interest, however, to emphasize again the personal element in court rulings. The classification in the law might easily have been found arbitrary and unreasonable; and the Adkins case of 1923 had ruled invalid a restriction on freedom of contract that probably was more directly related to general welfare than was the case in question.

### Attempts at federal regulation

Taken as a whole, the period of the 1920's was not one which will be remembered for its progressive legislation and court decisions. With respect to state regulations of hours of work, this is true, and during the same period the federal government took no action in that field. In the 1930's came the great depression, with the steady increase in unemployment that resulted in 1933 in nearly one-third of the working population being out of a job. With the states generally unable or unwilling to take strong, positive steps to meet the problem, the federal government assumed the burden of trying to revive the faltering economy. Of necessity, one important part of such an undertaking was a means of cutting down the number, approximately 15,000,000 persons, out of work. Consequently, the federal Congress made several attempts to cut hours; thus to spread the available work among more persons; the attempts prior to the enactment of the Wage-Hour Law of 1938 will be examined now.

The first attempt of the government to cut hours of work was in the National Industrial Recovery Act. That enactment was a broad and inclusive attempt at recovery that dealt with wages, hours, child labor, pricing policies, relief, and public works. The wage and hour provisions were directed at increasing wage rates and decreasing hours of work. The means of putting these measures into effect was through the codes of fair competition called for in the act.<sup>4</sup> Under the Recovery Act, one or more trade or industrial associations or groups could draw up codes of fair competition to regulate business practices in their industry or part of an industry. Upon completion by the industry group, the proposed codes were submitted to the National Recovery Administration for examination and approval. After public hearings and study by labor, industry, and consumer advisory boards, the codes were modified, if changes were thought necessary, and were then put into effect by executive order. The code was then a part of the law of the land, with penalties provided

<sup>4</sup> 48 Stat. 195, 1933.

for violation. It should be kept in mind that these codes were not legislative enactments; they were specifically provided for in the original act but the Congress had nothing to do with the preparation, approval, or effectuation of the act.<sup>5</sup> This fact helps to explain the action of the Supreme Court when it considered the validity of the N.I.R.A.

Certain provisions other than the codes were allowed or imposed under the act. Section 7(b) of Title I provided that every opportunity should be allowed for employees and employers to establish "by mutual agreement, the standards as to the maximum hours of labor, minimum rates of pay . . . and the standards established in such agreements, when approved by the President, shall have the same effect as a code of fair competition." At the start of the recovery program, however, the union movement was weaker than it had been at any time in the preceding fifteen years, so that there were not many industries that were strongly enough organized to make such agreements feasible. As events worked out, there was no great amount of activity under this provision. There was considerable supplementing of the codes in the bituminous coal and construction industries. Otherwise, the section was almost unused.

In addition, there was the blanket code, or President's Reemployment Agreement; this was a sort of interim code that the President urged employers of two or more persons in towns of 2500 or more population to adopt until the time that a code was completed for their industry. The hours provisions of the blanket code urged a thirty-five-hour work week with a maximum forty-hour week and eight-hour day permitted for short periods. In October, 1933, the President, by executive order, deleted the provision permitting the forty-hour week as it applied to any factory or mechanical worker. As was the case with the other codes, the President's Agreement did not supersede the provisions of collective agreements. The maximum-hours provisions of the blanket code did not apply to managers and executives. This provision supposedly allowed exemption only of those doing real managerial or executive work and earning at least \$35 per week.

Provisions of the codes that dealt with hours of work were much more inclusive than those concerning wages. In attempting to govern work time, distinction was made in most of the codes between different classes of employees, the two most frequent classifications being factory or general workers in the one group and the clerical,

<sup>5</sup> For a discussion of the labor provisions of the N.I.R.A. and the codes drawn up under it see: U. S. Bureau of Labor Statistics, Bulletin No. 616, *Handbook of Labor Statistics*, pp. 491-536. Washington, D. C.: U. S. Government Printing Office, 1936.

accounting, and office force in the other. There were departures from this practice, however; slightly more than ten per cent of the codes set the same hours for all workers. Many of the codes separated firemen, engineers, and watchmen from all other groups. Other groups such as truckmen, shipping clerks, repairmen, and the like occasionally were given special treatment.

As will be noted later, the permission of overtime work in most codes made the maximum-weekly-hours provisions somewhat misleading. However, even though overtime was permitted, the emphasis of the codes was on limiting the hours of labor. Altogether, 535 codes were established between the enactment of the N.I.R.A. and December, 1934. All of these codes contained, of necessity, some provisions concerning hours of work. These provisions varied widely from twenty-seven hours in one case to fifty-four hours for factory and general workers in another. Work weeks of fifty-six hours were allowed for firemen or engineers in a few instances and for watchmen in more than two-thirds of the codes that made special provision for them.

The great concentration of hours for general workers and the office force was in the neighborhood of forty hours per week. The flat forty-hour week was frequently used, although it was not as strongly favored as was the forty-four-hour week, either with provision for longer hours in peak periods or with the privilege of making the work week average forty hours over a period of time. Probably four-fifths of the codes provided some variation of the forty-hour week for factory and general workers and for the office force. Except for firemen, engineers, and watchmen, it was a rare code that provided for longer than a forty-four-hour week.

The practice of averaging hours over a period of time developed in an undesirable manner, in the eyes of the Recovery Administration. Some of the codes containing this provision allowed averaging over as long as a year. It was felt that the practice of averaging work time impeded the regularization of employment. Consequently, in July, 1934, an executive order was issued stating that there should be definite limits upon the extension of the work week and that overtime should be paid for the excess working time. This order did not affect codes that had been drawn prior to July, 1934.

The eight-hour day was common in most of the codes, and a full or partial shift on six days was the usual situation. Occasionally, a code that provided for fewer than forty hours per week specified seven or seven one-half hours per day. Many of the eight-hour codes allowed nine hours in periods of peak employment. In some

codes watchmen were allowed as much as twelve hours work in twenty-four hours. Although the six-day week was widespread, the five-day week was provided for in a small number of codes.

Another interesting limitation on hours found its way into some of the codes. It clearly was not designed to keep down weekly hours of work, but rather to curtail production, but it is worth noting briefly. Forty-five codes, eight per cent of those analyzed by the Bureau of Labor Statistics, put limits on the amount of time that a plant was allowed to operate in any week. These limits normally were set by limiting the number of shifts per day, although there were a few outright limits set on the number of hours a plant could run per day or per week. These restrictions were most common in textiles.

As was stated above, most of the codes made some provisions for overtime, so that maximum weekly hours amounted in most cases to a setting of the basic work week with a possibility of working longer periods at penalty rates. Eighty-six per cent approved some sort of overtime payments. Office workers were the group most abused in this provision; less than four per cent of the codes provided extra overtime compensation for them. On the other hand, approximately three-fifths of the codes provided overtime for factory and general workers, and nearly one-half dealt similarly with those doing emergency maintenance and repair work. Time-and-a-half was the usual rate of compensation for overtime, with time-and-one-third used occasionally. Payment for overtime either at the regular rate or double-time was extremely rare. Most of the codes with no overtime provision did have some method of averaging overtime and undertime to take care of certain employment beyond maximum hours.

### The N.I.R.A. and the Supreme Court

The N.I.R.A. was invalidated by the federal Supreme Court when it came before the body in 1935.<sup>6</sup> The act had been passed on the basis of congressional power to regulate interstate commerce. It was attacked by the Schechter Corporation as a measure going beyond the power granted Congress under the interstate commerce clause. Lawyers for the company also contended that the granting by Congress of the power to formulate codes was an unreasonable delegation of legislative power, in that there were no definite standards established for drawing them or granting approval. Also, the standard accusation levied at all economic controls was made; namely: it deprived persons of liberty and property without due process of law.

<sup>6</sup> *Schechter Poultry Corporation v. United States*, 295 U. S. 495 (1935).

Mr. Chief Justice Hughes delivered the opinion of the Court. In his opinion, the primary issue was the wage and hour provisions of the code governing the live poultry industry, since the Schechter Corporation was appealing from a finding that it had been guilty of violating that code. The Chief Justice took a rather narrow concept of interstate commerce, and on that basis ruled that Congress had exceeded its powers of regulation. Already he had ruled that there was an invalid delegation of power in the act. As to the scope of interstate commerce, the Chief Justice said, "It is plain that these requirements are imposed in order to govern the details of defendants' management of their local business. The persons employed in slaughtering and selling in local trade are not employed in interstate commerce. Their hours and wages have no direct relation to interstate commerce." As a capstone to the invalidation, it was said, "Stress is laid upon the great importance of maintaining wage distribution which would provide the necessary stimulus in starting 'the cumulative forces making for expanding commercial activity.' Without in any way disparaging this motive, it is enough to say that the recuperative efforts of the federal government must be made in a manner consistent with the authority granted by the Constitution."

Thus, the N.I.R.A. experiment in wage and hour controls came to an end. It was an emergency action by the Congress to meet a serious economic situation. That it was not an ideal piece of legislation is indisputable. But here, again, was the Court philosophy that the meaning of certain provisions of the Constitution remains the same regardless of social and economic conditions that may change markedly from time to time. To the social scientist, this is a questionable, if not an indefensible, doctrine, since changing economic and social conditions make changes in government programs and policies necessary if the democratic way of life is to continue. And the narrow interpretation of the power conferred by the commerce clause was soon to give way. Many of the provisions of the N.I.R.A. that were killed by the Schechter decision were reenacted within the following three years on the basis of the commerce power; the most significant of these were validated later by the Supreme Court in test cases. So the Schechter decision was a sharp but relatively short-lived setback to the growth of federal labor controls.

#### Hours under the Public Contracts Act

The Walsh-Healy Public Contracts Act<sup>7</sup> followed shortly after the demise of the N.I.R.A. It sought to control to some extent the wages and hours of workers by setting minimum standards that had

<sup>7</sup> 49 Stat. 2036, 1936.



to be observed by contractors while producing goods of value in excess of \$10,000 to supply to the agencies of the federal government. The gist of the hours provision of the law was that employees engaged in or connected with the manufacture, fabrication, assembling, handling, supervision, or shipment of materials, supplies, articles, or equipment used in the filling of such a contract may be employed in excess of eight hours in any one day or in excess of forty hours in any one week, but only if such persons are paid for any hours in excess of such limits the overtime rate of pay.<sup>8</sup> The overtime rate prescribed, unless changed by the Secretary of Labor, was to be one-and-one-half times the basic hourly or piece rate received by an employee.<sup>9</sup>

This law, like the N.I.R.A., did not specify a maximum number of hours that could be worked; rather, it set a basic work day and week beyond which overtime was to be paid. But any number of hours could be worked per day or per week if penalty rates were paid for the time in excess of the basic week or day. The law has been interpreted as requiring payment for overtime on the daily or weekly basis, whichever is greater. That is, a person working four ten-hour days in one week would be entitled to forty-four hours pay for the week, even though he had worked only forty hours; on the basis of an eight-hour day, he worked two hours overtime daily for which he was entitled to three hours pay. Similarly, a work week of six eight-hour days entitled a worker to fifty-two hours pay for the week, even though he worked no excess hours on any one day. Regardless of whether rest periods or a number of hours off duty were granted any combination of more than eight hours of work in twenty-four consecutive hours called for overtime. The law had no effect on the days on which work was done; it did not prohibit Sunday or holiday work.

Up to 1938 the attempts of the federal government to control hours of labor had not been very effective. In the first place, the Congress really had not sought to specify maximum hours of labor. Only in 1907, when Congress passed the Hours of Service Law prohibiting more than sixteen consecutive hours of work within twenty-four hours for trainmen in interstate commerce, was there an attempt to set the maximum number of hours of labor. Probably that act was not so much a labor law as a public safety law, and its cover-

<sup>8</sup> *Walsh-Healy Public Contracts Act, Rulings and Interpretations*, No. 2, p. 26. Wage and Hour and Public Contracts Division, U. S. Department of Labor, 1939.

<sup>9</sup> Similar legislation, the Davis-Bacon Act of 1932, sought to set standards of employment on construction for the government. It was to encourage, among other things, the thirty-hour week, where feasible. The relatively small number of persons working on construction projects for the government detracted from the effectiveness of the law.

age was relatively limited. In the Adamson Act of 1916, setting the eight-hour day for railroad workers, in the N.I.R.A., and in the Walsh-Healy Act the approach had been to make overtime more expensive but not to prohibit it. Therefore, in 1937 or 1938, with the N.I.R.A. dead, federal hours contracts amounted to prescription of a basic eight-hour day on the railroads and an eight-hour day and forty-hour week (basic) for those government contractors supplying more than \$10,000 worth of goods to the government. Not only was there a need for broader coverage of the laws, but there was also a need for a federal maximum-hour law that did not permit more than a certain number of hours of work except in a genuine emergency.<sup>10</sup> Such a law would supplement state hours legislation and have the effect of bringing hours of work in those states with lax laws into line with national policy.

#### Current hours regulations by states

We have noted that state maximum-hours laws had been validated for both men and women prior to the first World War and that there was no marked trend since that time to improve and expand the laws. We can pass over the slight and slow changes that have occurred from time to time in recent years and note the post-World War II status of state maximum-hours laws.

The majority of the states have established laws governing the maximum hours of work of women. In 1947 there were only six states without maximum hour limitations for women.<sup>11</sup> The lowest limit set was the forty-four-hour week allowed under the Pennsylvania law. Most of the laws provided for an eight-hour day and/or a forty-eight-hour week; twenty-one states had such laws. The other laws varied widely. South Carolina allowed as much as twelve hours daily and sixty hours weekly. A few other states allowed as much as sixty hours per week, and some ten states allowed a nine-hour day and fifty-four-hour week or some variation of that general standard.<sup>12</sup>

If it is assumed that long hours of work for women are especially harmful and should be controlled by the states, then it is clear that at least one-half of the states are not fulfilling their obligations. Roughly one-half of the states allow from fifty hours of work per week on up to an unlimited amount. In view of the frequently

<sup>10</sup> The Fair Labor Standards Act of 1938, including the provisions dealing with hours of work, is discussed in Ch. XIV.

<sup>11</sup> Alabama, Florida, Georgia, Indiana, Iowa, and West Virginia. The data presented in the following paragraphs are drawn from Prentice-Hall's *Complete Labor Equipment*, Vol. 3, *State Labor Laws*.

<sup>12</sup> For a tabular presentation of maximum hours for women in 1946 see: Peterson, Florence, *Survey of Labor Economics*, p. 462. New York: Harper and Brothers, 1947.

mentioned fact that the motherhood function of women makes their health important to the community and of the fact that many women try to cook and maintain a home after their regular working hours, an eight-hour day and a five one-half- or six-day work week would seem to be the maximum reasonable work time for women. If that be the case, state laws need to be amended in all states allowing more than forty-eight hours of work per week. This need is especially pronounced in the South; many of the states in that region have no limitations of any sort or allow from fifty-four to sixty hours of work per week. Although the need is not now so great as it was prior to passage of the Fair Labor Standards Act in 1938, it is still large because many types of occupations are not covered by that law.<sup>13</sup>

There is still another factor requiring additional action by most of the states. The maximum-hours laws that do exist in the states all allow some groups, such as agricultural and domestic workers, and frequently telephone operators and restaurant employees, to be exempted from coverage. Sometimes the laws are limited to factories, mercantile establishments, and so forth. By one means or another, considerable numbers are left without any protection. It is true that emergency situations will arise when hours laws should not be operative and that there is undoubted difficulty in applying legislation to very small employers, but it is clear that much broader coverage could be given in many of the laws.

Almost all state laws covering hours of work are confined in their coverage to women and minors; it is reported that only three include men in the general coverage of their maximum-hours laws.<sup>14</sup> In most states, however, there are limitations on work time allowed in specific industries. All of the states except five specify, in addition to any general maximum-hours laws they may have, allowable hours of work in listed industries. These provisions vary so widely from one state to another that they cannot be summarized. The listed industries may range from one to perhaps a dozen; sometimes only the hours for women are set, but in many instances they are specified for all employees. Many of these laws are directed as much at public health and safety as they are at improving labor standards as such. The industries most commonly listed in which considerable numbers of men are employed are: motor vehicles, railroads, mines and smelters, and jobs in which men work under compressed air, such as in the driving of tunnels and similar work.

<sup>13</sup> It will be shown later that the Fair Labor Standards Act was applicable only to persons whose work was such as to affect interstate commerce. Thus, retailing, laundries, and many other traditional "women's employers" are not subject to any control under the federal law. For such employees, it is state regulation of hours or none at all.

<sup>14</sup> Oregon, Mississippi, and North Carolina. Peterson, F., *op. cit.*, p. 466.

Although many of the states have not seen fit to extend adequate protection for women regarding hours worked, almost all<sup>15</sup> have encouraged the spiritual well-being by legislating to provide one day of rest in the week—Sunday commonly being the specified day. These laws, like many others, however, have many exemptions and offer little protection from excessive hours of work.

The story of the regulation of hours of work is a disappointing one. Up to 1938 the federal Congress had been allowed to control the hours only of limited groups: their own employees, seamen, railroad workers, and workers employed on government contracts of more than a certain size. For the railroad and contract workers the control was not an outright prohibition, other than the sixteen-hour maximum for railroaders. The one attempt at general control of the hours of work of private employees was invalidated by the High Court.

States, on the other hand, for a long time seem to have had a clear field for regulation if they chose so to act. Despite the need for controls and court approval of similar action, the states have moved into the field very slowly. This lethargy is a reflection of the general reluctance of the people of the United States to enact legislation for social and economic control. Our reverence for individualism and individual initiative is so great that its conquest is a lengthy process. As a consequence, notwithstanding Supreme Court approval of maximum-hours laws for women nearly forty years ago, nearly fifteen per cent of the states still offer no protection at all. Another half-dozen permit fifty-five hours of work or more per week. Justice Brandeis' briefs supporting maximum-hours legislation might well be made required reading for the legislators of many of our states.

### Questions

1. Were the codes of fair competition of the N.I.R.A. a violation of the anti-trust laws?
2. Distinguish between maximum- and basic-hours regulation. Are laws setting basic hours in reality hour or wage controls?
3. In view of the reduction of hours of work that has come through employer action or as a result of collective bargaining, are maximum-hours laws needed?
4. How would the curtailment of hours of work that was undertaken in "New Deal" legislation affect employment opportunities? Why?
5. Supreme Court sanction of laws setting maximum hours of work for women was given about forty years ago. How do you explain the fact that a number of states still set no maxima?
6. Why did federal regulation of hours of work come at such a late date?

<sup>15</sup> Nevada and Wyoming are the only exceptions.

## CHAPTER XII

### GOVERNMENT CONTROLS AFFECTING WAGES

#### Reasons for wage minima

We have already noted the beginning of government controls of wages for women in the pre-World War I period. It will be recalled that in 1917 the Supreme Court divided four to four in the case of *Stettler v. O'Hara* on the issue of the constitutionality of minimum-wage laws. Thus, as the nation moved into the postwar period, there was no definitive statement regarding the constitutionality of such legislation. The nation did not have to wait long for an answer. Altogether, nearly twenty years were to pass before the proponents of such laws had a clear approval from the courts of minimum-wage regulation.

The entire history of wage controls prior to the second World War was a series of attempts to put a floor under wages.<sup>1</sup> (To anticipate the more detailed subsequent discussion of wartime wage controls of the forties, it may be noted that then for the first time in the history of the United States as a nation attempts were made to put a ceiling over wages.) What are the reasons for this continued but ineffective policy?

Among the reasons for the government policy was the desire to restrict the extent of poverty and bring the earnings of workmen into some semblance of a reasonable relationship to the cost of living. As will be shown later, after the Supreme Court first ruled that laws using that basis for determining minima were invalid, many states suddenly found another reason for setting minima. Laws were enacted requiring that minimum rates be commensurate with the reasonable value of the services rendered. Probably such provisions were only window dressing, and the real purpose continued to be to require that the lowest wage rates be pushed closer to the cost of a minimum standard of living. But the window dressing was not convincing to the courts.

Another reason for establishing minima was to exert some leveling

<sup>1</sup>This statement applies to the United States as a nation. Prior to national independence there were attempts by the colonies to impose maximum wages. These arose from the shortage of labor in the colonies and from the Mercantilist philosophy of pro-business control. The attempts were not very successful.

influence on the competitive ability of various firms. Although lower wages do not always mean an advantageous competitive position, they may have that effect; in other words, if the lower wages show in lower costs per unit of output, they will have that effect. While lowered production costs are not to be criticized as such, they are to be criticized if the lower costs come from wages too low to afford a minimum standard of living. If a worker's wage is too low to provide a living for him and his family, then in the long run society is the loser by virtue of the relief that may have to be granted, the sickness that is likely to weigh more heavily on such families, and the limited opportunity for the education and training of the children. If society is the final loser from low wages, then it has a right, or perhaps a duty, to ensure that such wages are not paid.

Another reason for government attempts to support wage rates was to maintain purchasing power of the public. It is clear that one of the basic economic problems of our society is to develop methods through which we are able to distribute all the goods that we are able to produce. To date, the only periods in the twentieth century in which we have been able to do this have been during and immediately before and after the two great wars. If adequate distribution is to be realized in peacetime, the primary approach must be one of extending the power of low income groups to obtain goods and services. The power to consume is already there, more so than in any other part of society; it is the acquisitive power that is not present. There are many ways in which the government might attack this problem, subsidies or government purchase and distribution being two of the more obvious. Higher minimum-wage rates are another approach; however, the higher wages will have such effect only if they are not cancelled by increased prices and if they do not result in the unemployment of persons previously at work.

These two conditions are the basis of objection by some economists to the principle of legal minimum wages. Those who base their economic reasoning on the assumption that economic competition is still sufficiently prevalent in our society to keep prices down and quality up argue that any legislation requiring higher wage payments will cause higher prices, thus cancelling for society any benefits that might otherwise accrue.<sup>2</sup> In many parts of our economy there is not competition keen enough to guarantee the close price-

<sup>2</sup> Only when the legally established minimum is higher than the competitive wages do prices have to be changed. And since approximately two-thirds of national income payments are in wages, even if all wages rose, prices would have to rise only two-thirds as much to cover the increased costs. For many enterprises wages comprise a much smaller portion of total costs; price increases necessitated by higher wages would be decreased accordingly in such plants.

cost relationship assumed. Even if such a relationship did exist, the higher price charged to cover the increased costs would be taken from various groups in society, many of whom are not at the very minimum income of the beneficiary of legal minimum wages.

The effects of minimum wages on the labor costs per unit of output are difficult to determine. However, certain facts should be noted. If employers are forced to raise their wages, they probably will try to get greater productivity from their employees. To the extent that they do so the net effects on labor costs will be dissipated. In addition, a higher wage may attract a more capable grade of labor, a factor which also will tend to dampen the increase in labor costs. This does not mean that all increases in wages can be absorbed in these ways. However, there is yet another factor to be noted, although the cause and effect relationship may be reversed in this case. Higher wage rates may do no more than compensate for technological advances that have been made. Although not all industries and plants improve at the same rate, the general trend has been toward greater productivity per man hour. To the extent that wage changes make up for improvements, they may only maintain a previously existing relationship between wages and production.

A second objection to minimum wages centers on the theory that workers are paid for what they produce and that minimum wages which push rates above productivity will force some inefficient workers out of a job.<sup>3</sup> One answer to this opinion is that most minimum-wage laws permit learners, handicapped persons, and the like to be employed at rates below the minimum. Therefore, persons who are not possessed of the abilities or experience of the ordinary workman may be hired anyway. However, this does not answer completely the objection outlined above; perhaps it cannot be disclaimed entirely. Contrary to the theories of many economists of some years ago, there are wide variations in the abilities of workmen. Under time wage rates, however, the good and bad workers in a certain wage bracket are paid alike. Undoubtedly, if an employer is of the opinion that the wage he is required to pay, either by union agreement or by law, is higher than the value of the services of the more inept workers, they will be laid off, unless, in rare instances, seniority rules prevent such action.

Although this objection has some validity, it is probable that it has been labored too much. Experience with the federal Fair Labor Standards Act, prior to the time that labor shortages pushed

<sup>3</sup> For a statement of this point of view see the article by G. J. Stigler, "The Economics of Minimum Wage Legislation," *The American Economic Review*, June, 1946, Vol. XXXVI, No. 3, pp. 358-367.

wage rates up, indicated that relatively few persons were forced out of work by the minimum wages that were set.<sup>4</sup>

Perhaps the strongest argument that the opponents of minimum-wage legislation have cites the persistence of statutory minima once they are established. Whereas price levels and costs of living vary widely and rapidly, minimum rates, which are set in part at least on the basis of these variants, stay fixed for long periods of time. For example, federal minimum-wage rates established prior to the war were not changed as the rising price level cut further and further into purchasing power. Similarly, the legal rates of many states go year after year with no modification. In view of the dynamic nature of costs of living, a minimum wage that is an attempt to lessen the degree and extent of poverty should not be so stable as it usually is. On the other hand, the administrative problems involved in changing minima are numerous and not easily solved. One of the requisites for making such legislation adequate is a higher degree of flexibility in rate determination. Experience to date has shown such flexibility hard to realize; much more of it than is now to be found can undoubtedly be granted through the policy of extending more authority to administrators, who should be good, carefully chosen appointees with civil service status.

### The development of minimum-wage laws

The story of minimum-wage legislation in the United States is indeed a confused one. As we have noted, a dozen states had enacted such laws for women by 1917, when the federal Supreme Court split evenly on the Oregon law. Since this split let stand the decision of the state court, which had approved the law, it was assumed that such legislation was constitutional. This seemed a reasonable assumption because the Justice who did not participate, Justice Brandeis, was widely known for his general sympathy toward labor's interests. On the basis of such assumptions, several other states, Puerto Rico, and Congress for the District of Columbia passed minimum-wage laws. By 1923 there were sixteen laws on the statute books, two others having been repealed. The law of the District of Columbia, enacted in 1918, was tested in 1923 to get a positive answer to the question left unanswered by *Stettler v. O'Hara*.

The law in question provided for setting the wages of women and children; it was attacked on—and the Court considered only this—the grounds of unreasonable interference with the freedom of con-

<sup>4</sup> *Monthly Labor Review*, April, 1941, Vol. 52, No. 4, p. 969. *Monthly Labor Review*, February, 1942, Vol. 54, No. 2, p. 318.



tract that adults are guaranteed under the Constitution. The decision, written by Mr. Justice Sutherland, reached one of the all-time peaks of Supreme Court conservatism. The Court made much of the fact that the case at issue concerned the company, operating a children's hospital in the District of Columbia, and an adult woman. Both wished the employment to continue, but under the wages set it could not. As the majority saw the statute prohibiting the employment, it was:

"simply and exclusively a price-fixing law, confined to adult women . . . who are legally as capable of contracting for themselves as men. It forbids two parties having lawful capacity . . . to freely contract with one another in respect of the price for which one shall render service to the other in a purely private employment where both are willing, perhaps anxious to agree. . . . The price fixed by the board need have no relation to the capacity or earning power of the employee, the number of hours which may happen to constitute the day's work, the character of the place where the work is to be done . . . it has no other basis to support its validity than the assumed necessities of the employee. . . . It is based wholly on the opinions of the members of the board . . . as to what will be necessary to provide a living for a woman, keep her in health, and preserve her morals."<sup>5</sup>

This stress on the price-fixing nature of the law was presumably to aid the majority in convincing themselves that there was a clear distinction between use of the police power to fix maximum hours and to fix minimum wages.

In the opinion of the Court, the law was unjust in that it applied to women and not to men, for "if women require a minimum wage to preserve their morals men require it to preserve their honesty." The law was criticized also because it required certain payments from employers, yet required "no service of equivalent value from the employee." In this particular criticism the court failed to consider the fact that job control by the employer was untouched, except that minimum wages must be paid to those hired. However, the employer was not required to hire or to continue to employ anyone. If a woman was not worth the minimum wage, usually around \$15 to \$16 per week, she could be dismissed.

This failure to recognize the significance of employer job control was basic to the Court's finding of invalidity. As they put it, "the feature of this statute which, perhaps more than any other, puts upon it the stamp of invalidity is that it exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business, or the contract, or the work the em-

<sup>5</sup> *Adkins v. Children's Hospital*, 261 U. S. 525 (1923).

ployee engages to do." As has been pointed out, the employer was left complete freedom to choose persons and retain only those who were worth keeping under the minima set. There was nothing to deny to the employer "that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence." If the employer felt that there was no "relation of just equivalence" between wages paid some worker and service rendered, he could sever the relationship completely and undertake a new and more promising one.

The Court resorted to a rather familiar action in finding the law unconstitutional. It figuratively threw up its hands at the potential extensions if the principle of the law were upheld. The worry of the Court was that "if . . . the police power may be invoked to justify the fixing of a minimum wage, it may, when the public welfare is thought to require it, be invoked to justify a maximum wage." It is difficult to see exactly what this adds to the opinion. The usual relationship of employer and worker is such that the only wage determination likely to be needed in normal times is that of minima. However, if under some special circumstances there were need for wage maxima, as was thought to be the situation during World War II, that case could be decided on its merits. The basic reason for the police power is to permit regulations that are in the public interest. There is no sound basis for the implication of the majority that the public interest could never be served by maximum-wage controls. Mr. Chief Justice Taft, in his dissent from the majority, held that the reasoning that approval might give a basis for maximum wages was a *non sequitur*. Whether it be or not, it was irrelevant; the question before the Court did not concern maxima.

One passage in the majority opinion implied that a minimum wage on some other basis might be approved. The Court stated "a statute requiring an employer to pay in money, to pay at prescribed and regular intervals, to pay the value of service rendered, even to pay with fair relation to the extent of the benefit obtained from the service, would be understandable." The Court gave no indication as to why such laws would be "understandable" whereas the one in question was so arbitrary. But the implication was clear that a law calling for payments commensurate with service rendered would be approved.

Two dissents were written in the case; that of the Chief Justice already has been mentioned. The gist of this opinion was that "employees . . . are not on a full level of equality with their employer and in their necessitous circumstances are prone to accept pretty much anything that is offered." He denied, as the majority of the Court had sought to prove, that there was a difference between min-

imum wages and maximum hours as limits on freedom of contract; either one is a departure from absolute freedom of contract. As to whether the minimum-wage law was a wise approach to the problem of low wages and poverty, the Chief Justice indicated that he held serious doubt in his mind. He pointed out, however, that "it is not the function of this Court to hold congressional acts invalid simply because they are passed to carry out economic views which the Court believes to be unwise or unsound."

Mr. Justice Holmes dissented in a separate opinion. The crux of his criticism of the majority was the point, already mentioned, that the law did not compel anybody to pay anything. It was only if a contract were entered upon that the law applied, and then only for the period of the contract's continuance by both parties. Like the Chief Justice, Mr. Justice Holmes stated that he doubted the wisdom of the law; however, the wisdom of legislative action was not to be judged by the courts so long as the action did not transgress constitutional limits set upon it.

#### Minimum-wage laws: 1923 to 1937

As a result of the Adkins decision, there was a decade of inaction or retrogression in the field of minimum-wage legislation. The federal Supreme Court held the Arizona law invalid in 1925<sup>6</sup> and that of Arkansas in 1927.<sup>7</sup> Other laws were invalidated by state or lower federal courts. In other states the laws were allowed to lie without enforcement. By the beginning of 1933 there were only nine such laws on the statute books, and some of these were inoperative.<sup>8</sup> However, by 1933 the effects of the depression on wage levels caused a number of states to reconsider the problem; in that year seven states enacted laws setting minima.<sup>9</sup> All except that of Utah were so worded as to try to escape the prohibition of the Adkins case. They were patterned after a standard bill proposed by the National Consumers' League. The laws provided, in brief, that when a substantial number of women and children were receiving less than a subsistence wage an investigation was to be conducted to determine whether the wages were commensurate with the reasonable value of the services rendered. Similar laws were enacted by Massachusetts in 1934 and by Rhode Island in 1936. The Utah law, however, used the earlier basis of the cost of a minimum standard of living.<sup>10</sup>

<sup>6</sup> *Murphy v. Sardell*, 269 U. S. 530 (1925).

<sup>7</sup> *Donham v. West Nelson Mfg. Co.*, 273 U. S. 657 (1927).

<sup>8</sup> California, Colorado, Massachusetts, Minnesota, North Dakota, Oregon, South Dakota, Washington, and Wisconsin.

<sup>9</sup> Connecticut, Illinois, New Hampshire, New Jersey, New York, Ohio, and Utah.

<sup>10</sup> *Monthly Labor Review*, April, 1940, Vol. 50, No. 4, p. 891.

The law enacted by New York in 1933 soon was tested in the courts. In answer to the contention that the law was unconstitutional, the attorneys sought to show that it was different from the type of law invalidated in the Adkins case. They based their argument on the fact that the law prohibited oppressive and unreasonable wages, which were less than the fair and reasonable value of the services rendered and less than sufficient to meet the cost of a minimum healthful budget. The line of reasoning did not convince the state Court of Appeals; when the case was heard by that body it held that the law was not materially different from the act held invalid in the Adkins case.

When the issue was carried to the federal Supreme Court,<sup>11</sup> it was another instance of a legal opinion of great importance, socially and economically, delivered on legalistic grounds with no attention given to the social and economic issues. Mr. Justice Butler delivered the decision of the Court, which by a five-four division held the law invalid. The majority leaned heavily on the decision of the state court. They quoted with approval the point in the lower court opinion that stated "the act of Congress had one standard, the living wage; the State act has added another, the reasonable value. The minimum wage must include both. What was vague before has not been made any clearer. One of the elements, therefore, in fixing the fair wage is the very matter which was the basis of the congressional act." Further, in the majority opinion it was stated that "the state court rightly held that the Adkins case controls this one . . . the legislation . . . is repugnant to the due process clause of the Fourteenth Amendment." In this decision the Court carefully recanted on its statement in the Adkins case implying acceptability of certain types of minimum-wage law. This time there was a blanket rejection of such laws:

"The dominant issue in the Adkins case was whether Congress had power to establish minimum wages for adult women workers in the District of Columbia. The opinion directly answers in the negative. The ruling that defects in the prescribed standard stamped that Act as arbitrary and invalid was an additional ground of subordinate consequence."

By this statement the Court made it clear that any legislation, whatever its basis, that sought to set a minimum wage for adults would not be acceptable. In one sense, therefore, the Morehead case is a much more sweeping denial than was contained in the Adkins case; in the latter the majority implied a willingness to approve

<sup>11</sup> *Morehead v. New York ex rel. Tipaldo*, 298 U. S. 587 (1936).

minimum-wage legislation based on value of services. But when such an opportunity was offered to them in 1936, they suddenly found that any sort of minimum that affected adults was invalid.

This line of thought did not convince four members of the Court; two dissenting opinions were written. In one dissent, written by Mr. Chief Justice Hughes and concurred in by Justices Brandeis, Stone, and Cardozo, it was argued that the New York law was not the same as the law invalidated in the *Adkins* case. It was pointed out that the previous statute was aimed only at starvation wages, whereas the New York law prohibited such wages only if the wages were also less than the reasonable value of the services rendered. Although validation of a minimum-wage law for women on any basis was desirable, this dissent is not of so much interest to us as the other dissenting opinion, written by Mr. Justice Stone and concurred in by Justices Brandeis and Cardozo.

Mr. Justice Stone opened by commenting that while he accepted the distinction in the two laws stressed by the Chief Justice, he did not attach great importance to it. Under neither basis was any employer forced to hire anyone whose services were thought to be worth less than the minimum wage. The comment on the protection of liberty under the fourteenth amendment was clear and pointed. To the dissenters it was apparent that "the liberty which the amendment protects is not freedom from restraint of all law or of any law which reasonable men may think an appropriate means for dealing with any of those matters of public concern with which it is the business of government to deal."

With regard to the realistic freedom of workers, the dissenters thought there was "grim irony in speaking of the freedom of contract of those who, because of their economic necessities, give their service for less than is needful to keep body and soul together." As to the results of such low wages, the dissenters commented, "No one doubts that the pressure in the community of a large number of those compelled by economic necessity to accept a wage less than is needful for subsistence is a matter of grave public concern, the more so when . . . it tends to produce ill health, immorality, and deterioration of the race." Proceeding from this, it was argued that the need of wage regulation and the reasonableness thereof was as clear as the need for many other restrictions of liberty that had been approved by the Court at various times.

As a climax to the dissent, Justice Stone argued, in essence, that the existence of low wages was in itself a social problem that warranted government regulation. This particular passage deserves to be quoted at length.

"In the years which have intervened since the *Adkins* case we have had opportunity to learn that a wage is not always the resultant of free bargaining between employers and employees; that it may be one forced upon employees by their economic necessities and upon employers by the most ruthless of their competitors. We have had opportunity to perceive more clearly that a wage insufficient to support the worker does not visit its consequences upon him alone; that it may affect profoundly the entire economic structure of society and, in any case, that it casts on every taxpayer, and on government itself, the burden of solving the problems of poverty, subsistence, health and morals of large numbers in the community. Because of their nature and extent these are public problems. A generation ago they were for the individual to solve; today they are the burden of the nation. I can perceive no more objection, on constitutional grounds, to their solution by requiring an industry to bear the subsistence cost of the labor which it employs, than to the imposition upon it of the cost of its industrial accidents."

These were strong words, but, as will be seen presently, the dissent was soon to be the opinion of the majority.

#### Final validation of minimum-wage laws

While the *Morehead* case was being decided another case was on its way to the Supreme Court on the same subject. The decision thereupon was to sustain the validity of minimum-wage legislation; in so doing the new majority relied heavily on the opinion previously voiced by the minority. This decision, as in the *Morehead* case of the preceding year, was by a five-four decision of the Court. One man, Mr. Justice Roberts, shifted his point of view, but all other members of the Court retained their opinion of the previous year. No one can say exactly what was the cause of the shift in the vote; a frequently voiced opinion as to the reason is the threat of the President to add members to the Court; naturally, such additions would have been persons who would reflect the attitude of the President on social and economic controls. Whether or not the plan to "pack" the Court was a threat or a sincere intent of the President cannot be known, but there was some event between 1936 and 1937 that caused Mr. Justice Roberts to swing over in favor of government control of wages. Thus, the shift of one man changed the entire court doctrine toward wage controls.

The background of the new case as it came through the courts may be noted briefly. The state of Washington had had minimum-wage legislation on the statute books since 1913; despite the *Adkins* decision of 1923 it had remained in effect theoretically, although not effectively enforced. The new case was a test of this law, suit

being brought by a chambermaid who was employed by a hotel for less than the \$14.50 per week of forty-eight hours prescribed by the state law. In arguing the case before state and federal Supreme Courts, the attorney for the state of Washington took a different approach than had those arguing the Morehead case of the previous year. In the new case<sup>12</sup> there was no attempt to get around the Adkins decision by proving the law in question to be different from that of the District of Columbia and that hence it could be validated without overthrowing the Adkins precedent. Rather, the argument was that there was sound basis for the exercise of the police power to set minimum wages and that the Adkins ruling should be reexamined. This probably was a wise move to make because the Court had not been asked the previous year to reconsider their dictum of 1923; because that still governed, the majority had held that minima set on any basis were invalid for adults. Perhaps this approach and argument rather than the threat of the President changed Mr. Justice Roberts' mind, but this is doubtful, since a more favorable attitude toward other economic controls was also shown in other cases.

Mr. Chief Justice Hughes delivered the opinion of the five-man majority. After reviewing the background of the case and the questions raised, he came to the question at hand with vigor:

"We think . . . that the decision in the *Adkins* case was a departure from the true application of the principles governing the regulations by the State of the relation of employer and employed. . . . What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? And if the protection of women is a legitimate end of the exercise of state power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end? The legislature of the State was clearly entitled to consider the situation of women in employment, the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are ready victims of those who would take advantage of their necessitous circumstances. The legislature was entitled to adopt measures to reduce . . . the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living."

Subsequently, the Chief Justice pointed out another socio-economic reason for validating the law. In his words:

"The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless

<sup>12</sup> *West Coast Hotel Co. v. Parrish*, 300 U. S. 379 (1937).

against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community. What these workers lose in wages, the taxpayers are called upon to pay. The base cost of living must be met. We may take judicial notice of the unparelled demands for relief which arose during the recent period of depression and still continue. . . . The community is not bound to provide what is in effect a subsidy for unscrupulous employers. The community may direct its law-making power to correct the abuse which springs from their selfish disregard of the public interest."

Although this latter comment is valid social and economic reasoning, there is one implication in it that may be regarded with some doubt. This is that the relief loads of the 1930's were due to low wages paid by employers. It is probable that the greater part of relief was caused by unemployment rather than low wages, although the latter may have lessened the demand for goods and thereby enhanced the severity of the depression.

From the quotations the ruling of the majority is evident. Nevertheless, the conclusion may be quoted; it is music to the ears of the proponent of legislative controls of social and economic problems. "Our conclusion is that the case of *Adkins v. Children's Hospital* . . . should be, and it is, overruled." Thus, after twenty years of uncertainty or unconstitutionality, minimum-wage laws for women and children were valid. In view of the events of the decade following 1937, it is doubtful if the Court ever will return to its pre-West Coast Hotel case point of view.<sup>13</sup>

The dissent, like the majority opinion, did not say much that had not been said in previous minimum-wage cases. However, one comment is significant and is worth examination. Mr. Justice Sutherland wrote the minority opinion for the four who dissented. He wrote, "It is argued that the question involved should now receive fresh consideration, among other reasons, because of the economic conditions which have supervened; but the meaning of the Constitution does not change with the ebb and flow of economic events." This view cannot be defended on grounds other than

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<sup>13</sup> Millis, H. A., and Montgomery, R. E., *op. cit.*, Vol. I, pp. 352-356, discuss two other points in the majority opinion which they consider quite significant. These are broader than the subject of wage regulation alone, but may be mentioned. In their opinion, one of the important points is the strong pronouncement that the Constitution does not sanction complete and uncontrollable liberty. The liberty of an individual is subject to social controls that are in the interests of the community as a whole. A second point is the denial in the majority ruling that legislation must apply equally to women and men in order to be valid. It had been argued that such legislation was in conflict with the requirement of the Constitution that all persons have equal protection of the laws.



purely legalistic ones. No social, economic, or political document or code of behavior should be considered as having a constant meaning regardless of circumstances. Equal protection of the laws, for example, should not call forth the same policies when economic power is relatively well-balanced as when it is quite unevenly distributed. The weak need much more legal protection than do the strong. And the idea that freedom of contract always is maintained by a hands-off attitude, regardless of power, is indeed naive. Technical and legalistic equality in actuality may result in more and more marked economic inequality. As inequalities develop further and further, the freedom espoused in the Bill of Rights of the Constitution cannot be maintained by following an interpretation of constitutional provisions that might have been valid a century ago under entirely different conditions. The basic argument of Mr. Justice Sutherland that the meaning of the Constitution does not change must be rejected by the social scientist. The Constitution may be considered a framework of governmental machinery and of stated principles for the guidance of the actions of that government. The action, however, that may be validated or denied on the basis of one of the principles may vary widely from time to time with the problems that the government faces.

On many points Mr. Justice Sutherland simply reiterated the opinion of the majority in the Adkins decision, which he wrote in 1923. It is interesting and perhaps disturbing to note that the vitally significant economic events of the late 1920's and the 1930's had left no discernible mark on the thought of Mr. Justice Sutherland and his co-dissenters.

As a result of the new decision, there has been a marked increase in the number of laws regulating wage rates of women and minors. In 1937 four states<sup>14</sup> passed new minimum-wage laws while four others<sup>15</sup> amended theirs and Massachusetts and New York reenacted theirs, a total of ten actions in the year of the decision. Other states revived enforcement that had been allowed to lag, and by 1940 four more states had enacted new laws, a like number had amended, and still others resumed enforcement.<sup>16</sup> Thereafter, in the rush of preparation for war, the movement began to mark time and little further progress has been made. In 1942 there were minimum-wage laws in thirty jurisdictions; twenty-six states and the District of Columbia, Alaska, Hawaii, and Puerto Rico.<sup>17</sup> Almost all

<sup>14</sup> Arizona, Nevada, Oklahoma, and Pennsylvania.

<sup>15</sup> Colorado, Connecticut, Minnesota, and Wisconsin.

<sup>16</sup> *Monthly Labor Review*, April, 1940, Vol. 50, No. 4, pp. 891-909.

<sup>17</sup> Women's Bureau, U. S. Department of Labor, Bulletin No. 191, *State Minimum Wage Laws and Orders*, p. 1. Washington, D. C.: U. S. Government Printing Office, 1942.

these laws were rather broad in their coverage of women and children in occupations other than agriculture and domestic service. Only Connecticut, Hawaii, and Puerto Rico had laws that covered men as well as women and minors, and four<sup>18</sup> applied only to women. Under most of the laws the minima were set by commissioners or other state agencies, although a few had statutory minima.

The situation had not changed markedly by 1947; there still were twenty-six state minimum-wage laws on the statute books,<sup>19</sup> but a few had been modified to cover men. At that time the laws of four states, Connecticut, Massachusetts, New York, and Rhode Island were applicable to men.

It is a little strange that so large a portion of the laws fail to include men. There are, however, a number of reasons why this has not been done. One is that as the trade union movement had grown, and its development into a significant organization came roughly during the same period as the minimum-wage movement, it had been primarily a men's organization; because members of unions had the power of those bodies for their protection they were not so much at the mercy of employers as were non-organized groups. A second reason for non-coverage of men was the fact that all knew, but some refused to admit, that the undesirable results of low wages or other substandard working conditions are more pronounced for women than for men. There was also the fact that the labor organizations existing prior to 1930 did not push for legislative protection, assuming the economic struggle to be the one in which unions must prove their worth.

#### State minimum-wage laws: 1947

The minimum-wage laws effective in the states in 1947 left much to be desired. First of all, twenty-two states, most of them in the South or in other agricultural areas, failed to offer even nominal protection to those not covered by the Fair Labor Standards Act of the federal government. In addition, some of the state laws either were restricted in coverage or were nearly inoperative.<sup>20</sup> The protection offered in some of the laws was rather slight; the statutory minimum set by Arkansas was \$1.25 per day of nine hours or less for women with six months experience and \$1.00 for the same length day for the inexperienced worker. Minimum wages in one industry

<sup>18</sup> Arkansas, Louisiana, Nevada, and South Dakota.

<sup>19</sup> Arizona, Arkansas, California, Colorado, Connecticut, Illinois, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Washington, and Wisconsin. See Prentice-Hall's *Complete Labor Equipment*, Vol. 3, *State Labor Laws*.

<sup>20</sup> Kansas, Louisiana, and Oklahoma.

in Ohio went as low as \$6.25 per week. Although these were unusually low provisions, they were a part of the minimum-wage picture just as were the more desirable laws. Even the more liberal guarantees by some states of a weekly minimum in the neighborhood of \$15 were far below the cost of any decent standard of living. To make matters worse, the states with reasonable standards could not be assured that industry would not gradually escape, if the standards were too high, by locating new plants elsewhere or by outright migration if such was feasible.

#### Attempts at federal control

For the reasons just mentioned there has been a continuing attempt on the part of the federal government and certain other bodies to introduce controls that are more uniform than those found in states acting individually. The federal government did not enjoy much success in its attempts prior to the passage of the Fair Labor Standards Act of 1938,<sup>21</sup> but there were a number of noteworthy experiments.

One series of attempts at promoting more uniform wage regulations may be noted prior to examination of federal actions. The late President Roosevelt, when he was Governor of New York, took the lead in calling conferences of the state governors; seven from the northeastern part of the country attended the first one to work out an interstate compact by which signatory states would agree to strive for laws setting uniform standards on working conditions, especially uniform wages for women and children. The first meeting, in January, 1931, was followed from time to time by others, up into 1934 when seven of the northeastern states did sign such an agreement, referred to as the Concord Compact. Massachusetts approved the compact in 1934, New Hampshire in 1935, Rhode Island in 1936, and the federal Congress, whose specific approval is required before any interstate compact is valid, in 1937, thus putting the agreement into effect.<sup>22</sup> However, the West Coast Hotel decision of 1937 validated the interference of the state in wage setting without resort to the subterfuge of acting in pursuance of an interstate agreement. And in the following year the passage of the federal wage-hour law introduced a measure of wage uniformity throughout the nation. Thus, the need for such joint action was largely removed.

<sup>21</sup> See below, Ch. XIV.

<sup>22</sup> For information on this compact see: Dodd, A. M. "Interstate Compacts." *U. S. Law Review*, February, 1939, Vol. 73, No. 2, pp. 75-83. See also: Bress, Thomas, "Some Aspects of the Concord Interstate Compact on Labor." *St. John's Law Review*, December, 1935, Vol. 10, No. 1, pp. 98-103. See also; Constitution of the United States, Article I, Sec. 10, for its provision on the subject.

Since such action was no longer needed, New Hampshire took action in 1943 to abrogate the agreement and Massachusetts did likewise in 1945. By 1946 Rhode Island had not taken such action. However, since it was necessary to have at least two ratifications in order for the compact to be in effect, it was no longer valid after the action of Massachusetts. Thus, the use of the interstate compact device in state controls did not, because of unforeseen events, amount to very much. Its development, however, did serve to stress the recognized inadequacy of independent action by the separate states.

Meanwhile, the federal Congress, recognizing the inadequacy of state wage controls, especially in the early 1930's, and the seriously low wages paid to many persons, began to step into the field, at first obliquely and later more directly. The first interference was in the enactment of the Davis-Bacon Act<sup>23</sup> of 1931. This law had little to do with the lower-wage recipients of our economy. It required that contractors on all government construction projects of value in excess of \$5000 (amended in 1936 to cover contracts in excess of \$2000) pay the prevailing wages for any work done on the project. Such a law could touch few women and children and actually set no minimum; if the prevailing wages in the locality were low, then the required wage was low too.

A similar law was enacted in 1936 that did have significant effect on wages of some lower paid groups. The Public Contracts Act of 1936,<sup>24</sup> commonly referred to as the Walsh-Healy Act, also applied to government contracts; employees working on contracts exceeding \$10,000 in value must be paid not less than the prevailing wages for the industry, as determined by the Secretary of Labor. The term "government contract" was interpreted to mean commitments to purchase made by the federal government and the districts and territories, other than Puerto Rico, and government-owned corporations, and so forth. Again, the law did not set a flat minimum, since the wages that were required were to be "not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries . . . currently operating in the locality."

The coverage of the act was considerably wider than the Davis-Bacon Act, and it extended to many industries where women and children were employed. In addition, as the nation swung into preparation for war, government purchases expanded rapidly and

<sup>23</sup> 46 Stat. 1494, 1931.

<sup>24</sup> 49 Stat. 2036, 1936.

the coverage of the act widened with each new contract for purchase of goods or some types of services. Coverage was also broadened by administrative rulings extending the provisions to the production of many items that went into finished products purchased by the government, such as leather for shoes being made under government contracts.<sup>25</sup> On the other hand, the law did not apply to "agricultural or farm products for first sale by the original producers," or to the sale of perishables. There have been numerous rulings on the applicability of the law and the act has been examined and validated by the Supreme Court.<sup>26</sup> Nevertheless, even with the expansion brought by many government contracts and by administrative rulings and despite the fact that both the Davis-Bacon and Walsh-Healy Acts have remained on the statutes, there was not an adequate means of government wage controls. There was need for an enactment of much broader coverage, one that would get to many who were not working on government contracts, and also for some protection more definite than that of the "prevailing wage" required in the acts. The federal government was busily experimenting along this line, and the result is worth examination as a significant, if abortive, attempt at social control.

The first broad and inclusive program of federal wage control came in the National Industrial Recovery Act of 1933.<sup>27</sup> Although the enactment was very broad in its stipulations, the minimum-wage provisions were not too complex.

As has been stated in the preceding chapter, 535 codes were approved between the enactment of the N.R.A., in June, 1933, and December, 1934. In these codes it was common to confine the minimum-wage provisions to unskilled labor, but over two-thirds of them did make some distinction between separate groups of workers—between office and production workers in most cases—and a few set up distinctions on the basis of sex, size of community, or some combination of factors. Differences between rates for the North and South were not infrequent.

The wage rates provided were widely varied. The lowest rate allowed in an industry within the country was fourteen cents per hour, in the laundry trade; pecan shelling and raw peanut milling provided for fifteen cents. On the other hand, the print-roller and print-block industry code set a minimum of seventy-five cents per hour. By far the most common minimum rates were from thirty-

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<sup>25</sup> U. S. Department of Labor, "Rulings and Interpretations, No. 2" on the Walsh-Healy Public Contracts Act, Wage and Hour and Public Contracts Division, p. 2. Washington, D. C.: U. S. Government Printing Office, 1943.

<sup>26</sup> *Perkins v. Lukens Steel Co.*, 310 U. S. 113 (1940).

<sup>27</sup> 48 Stat. 195, 1933.

five to forty cents hourly. On a weekly basis, since forty hours was urged as the standard work week, a wage of \$14 to \$16 was most common, although the Puerto Rican needlework industry allowed a \$2 weekly minimum and, on the continent, the bootblacks in the shoe-rebuilding trade were allowed a \$6 weekly minimum.<sup>28</sup>

Of all the codes, only thirty-five established minimum rates for persons other than the unskilled. The majority of these were in the clothing industry. In the majority of the codes that had no such provision a general statement was included to the effect that wage differentials between occupational classes were to be maintained. Such provisions varied widely and did not always offer full protection to the more skilled groups. Perhaps this was not too serious an omission; if some classes were not to be given adequate protection, then it had far better be the more skilled whose skill and, in many instances, union membership gave them a measure of protection that the unskilled did not have.

Perhaps one other policy of the federal government might be noted for its effect on wage rates. Congress wrote into the N.I.R.A. the first general guarantee of the right of workers to organize and bargain collectively; this, of course, came to an end with the Schechter ruling. As a consequence, Congress enacted in 1935 the National Labor Relations Act, which restated in a separate law the right of organization previously found in Section 7 (a).<sup>29</sup> Indirectly, this was a means of encouraging higher wage rates. The greater bargaining power of organized workers makes it possible to demand and get higher wages. In a sense, then, the National Labor Relations Act was a part of the general "New Deal" policy of encouraging the payment of higher wages.

Such was the situation with regard to minimum-wage determination just prior to the enactment in 1938 of the Fair Labor Standards Act, also known as the federal Wage-Hour Law. It was a spotty picture, with many states having no laws and a few just beginning to reapply their laws after the West Coast Hotel decision. In other states such legislation was being drafted as a result of the Court ruling. However, standards varied widely, and some of the laws gave little protection. As for the federal government, its one attempt to regulate on a widespread scale had been killed by the High Court; its ability to prescribe the minimum wages to be paid by its

<sup>28</sup> Exceptions were permitted under prescribed conditions for substandard workers, that is, "a person whose earning power is limited because of . . . defect, age, or other infirmity." Permission from the state was required to permit employment below the minimum rate.

<sup>29</sup> Federal legislation concerning the right to organize will be discussed in some detail in Chs. XVI, XVII, and XXV.

contractors did not cover many workers. It was clear, therefore, that there was a genuine need for a federal law to set minima for many who were not touched by state regulations and to bring some degree of uniformity to the minima applicable to those who could be reached by federal authority.

### Other wage laws

Apart from the laws that determine minimum rates of wages, there is a considerable body of legislation and governmental policy that affects wages in one way or another. For example, in 1946 there were seven state laws that forbade discrimination in wage rates on the basis of sex. Commonly the prohibition is against the payment of lower wages to women than to men for "equal work" or "equivalent service" or to those "similarly employed."<sup>80</sup> In addition, in the federal civil service and generally in the states that have civil service no distinction is made between sexes. None of the attempts by the federal government to control rates have made any distinction in pay for males and females.

It should be noted in passing, however, that the enforcement of equal-pay laws is not easy. Ascertaining observance of a minimum-wage law is relatively simple; an examination of payroll data should show whether the minima are being paid. But the requirement of equal pay for equal work or equivalent service brings up the difficult problem of comparing jobs. Job evaluation requires much careful investigation of the duties and responsibilities of one type of work as compared with another. The titles given to jobs cannot be relied upon. Despite the very real difficulties in "equal-pay" legislation, it seems clear that laws, government policies, and union action slowly will bring to an end or at least lessen the degree of discrimination between the wage rates of men and women.

Nearly all of the states have some legislation dealing with the payment of wages. In most jurisdictions it is required that wages be paid at least twice per month, and it is common to require that wages paid at these times must compensate for services rendered up to not more than two weeks prior to the time of payment. A few of the states require payment no less frequently than at weekly intervals, while a small number do not have any requirement as to frequency of payment and Alaska and Oregon allow monthly payments.<sup>81</sup>

<sup>80</sup> The states are Illinois, Massachusetts, Michigan, Montana, New York, Rhode Island, and Washington. See: Plunkett, M. L., "Equal Pay for Women Workers." *Monthly Labor Review*, September, 1946, Vol. 63, No. 3, p. 380 ff.

<sup>81</sup> For summaries of all state laws dealing with wage payments see Prentice-Hall's *Complete Labor Equipment*, Vol. 3, *State Labor Laws*.

In past years there was a rather common practice of paying workers, especially at isolated mining and lumber camps, in scrip. This token money could be spent at the company store, where prices were high and where it usually was redeemable in money at less than face value. Such methods of payment now are prohibited in most states. However, nearly one-third of the states do not forbid wage payments in scrip.<sup>32</sup> In these instances the states are derelict in their duty of ensuring that workmen are paid for their labor in lawful money that can be spent wherever the worker chooses, rather than at the company store.

In order to guarantee that workers will be paid the money due them, most states have enacted laws that give a prior claim to the payment of wages in case a bankrupt employer does not have assets sufficient to satisfy all claims. Similarly, many states have enacted laws that restrict or limit the right of workers to assign more than a certain portion of their wages as a method of paying indebtedness. Such laws generally provide that not more than ten to twenty-five per cent of wages can be assigned or "garnisheed."<sup>33</sup> These laws vary widely in coverage and exact nature of provision. In a somewhat similar vein, a number of states prohibit the worker from making a kickback of part of his wages in order to obtain or hold a job. With the labor shortage of the war and immediate post-war period in mind, it is difficult to realize that such practices were not uncommon during the depression years.

In addition to state laws, the federal government legislated in 1934 against kickbacks; a congressional investigation had revealed this practice to be prevalent in the building trades, some instances reportedly running as high as twenty-five per cent.<sup>34</sup> The enactment, the Copeland Act,<sup>35</sup> was aimed at stopping kickbacks on construction or building work financed in whole or in part by federal funds. Fines up to \$5000 and imprisonment up to five years could be levied on violators.

Such was the general picture of federal and state wage controls in 1938; except for the enactment of the Wage-Hour Law, the situation did not change markedly during the next decade. During the war years there was no strong trend to press forward with progressive and more liberal labor legislation. And in the postwar years the major emphasis at both state and national levels was on legislation concerning labor relations. Owing to the fact that so little was

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<sup>32</sup> Peterson, Florence, *Survey of Labor Economics*, p. 403. New York: Harper and Brothers, 1947.

<sup>33</sup> Prentice-Hall's *Complete Labor Equipment*, Vol. 3, *State Labor Laws*.

<sup>34</sup> *Prentice-Hall Labor Course*.

<sup>35</sup> 48 Stat. 948, 1934.



done in a decade of rising prices, governmentally fixed minimum wages were by 1947 far out of line with amounts necessary for a minimum standard of living.

### Questions

1. Present the pros and cons of a government policy of setting minimum wages. What effect, if any, will a minimum-wage law have on total opportunities for employment?
2. How can you explain the shift in the attitude of the Supreme Court toward minimum-wage legislation, as evidenced by the Morehead decision of 1936 and the West Coast Hotel decision of 1937?
3. Mr. Justice Sutherland said in his dissent to the West Coast Hotel ruling that "the meaning of the Constitution does not change with the ebb and flow of economic events." Evaluate this statement.
4. Why have so many of the state minimum-wage laws failed to include men?
5. If minimum wages are to be established by law, what practical basis can be used for determining what the minimum should be?
6. Once a minimum-wage law is enacted, it seems very difficult to get the minima changed. What methods might be used to overcome this difficulty?

## CHAPTER XIII

### CONTROL OF CHILD LABOR

#### *Background of federal child labor legislation*

It has already been noted that the problem of child labor was recognized by the states early in the nineteenth century and that most states took some action, of widely varying degrees of effectiveness, prior to 1900. However, it was also noted that the number of employed children and the proportion of them to the total child population continued to rise up through 1910. In view of the great differences in state controls and the continued increase in the problem of child labor, the federal government began to interest itself in the problem early in the twentieth century. A large part of the story of child labor regulation between the two World Wars is a story of federal controls.

If one accepted the desirability of effective control of child labor, it was clear by 1915 that federal control was needed. With federal control the backwardness of some states could be wiped out, in so far as child labor contracts were concerned. In states that had established progressive, high standards a federal law setting lower ones would not undermine their standards at all. The new results of a federal law, therefore, would be to raise, for the industries to which it applied, standards in the less progressive states to the federally prescribed level and still leave the way open for any state that so desired to set higher levels of performance.

At least one economic objection to a federal standard could be raised. The seat of control would be further removed from the businesses regulated and the amount of red tape increased. However, such objection to federal control probably was and is overplayed. Almost every federal agency of any size will establish some sort of field organization with representatives at regional and usually at local or district levels in order to maintain closer contact with the localities in which problems develop. It is extremely doubtful if the real reason for objection to federal control is the remoteness of the control; it more likely stems from a realization of the greater effectiveness of federal control. We will note that the strongest objections to federal action came from the areas where state controls generally were weakest.

### The first federal control of child labor

Recognizing the need for uniformity and higher standards of regulation of child labor, the federal government began in 1916 a series of attempts to establish nation-wide controls. Six efforts of the Congress made up this series of moves; the first four were unsuccessful and the fifth was narrow in its coverage. Let us examine these attempts.

In 1916 Congress enacted, by a very large majority in each house, a law that prohibited the transportation in interstate commerce of goods produced in factories or canneries that had employed within thirty days of the time of shipment children under fourteen or between fourteen and sixteen for more than eight hours per day, forty-eight per week, or between 7:00 P.M. and 6:00 A.M. Shipment of the products of mines employing children under sixteen years of age also was prohibited.<sup>1</sup> This was a new use of the power to regulate interstate commerce, namely, to exercise controls over labor policies, but Congress assumed that it had precedents warranting passage of the regulation. Laws prohibiting the shipment of lottery tickets in interstate commerce<sup>2</sup> and the transportation of women across state lines for purposes of prostitution<sup>3</sup> had been approved by the federal Supreme Court. Although those controls had been accomplished through exercise of the commerce power, Congress was due for a surprise when the new law came before the Court.

A case to test the validity of this law was brought by "a father in his own behalf and as next *friend* (*italics mine*) of his two minor sons . . . employees in a cotton mill at Charlotte, North Carolina to enjoin the enforcement of the act. . . ."<sup>4</sup> The law was attacked on three bases: (1) in reality, it was not a regulation of interstate commerce; (2) it violated the tenth amendment; and (3) it violated the fifth amendment. By the statement of the majority of the Court, the most controversial of the issues was that of whether the commerce power furnished a basis for regulations of intrastate conditions, such as the act in question attempted. How far could the interstate commerce clause be stretched?

In the opinion of five of the justices, the commerce clause could not be extended as the Congress sought to do in the child labor law. The Court majority held that preventing the shipment of lottery tickets or the transporting of women for immoral purposes were not the same type of problem. The Court held that in those cases:

<sup>1</sup> 39 Stat. 675, 1916.

<sup>2</sup> *Champion v. Ames*, 188 U. S. 321 (1903).

<sup>3</sup> *Hoke v. United States*, 227 U. S. 308 (1913).

<sup>4</sup> *Hammer v. Dagenhart*, 247 U. S. 251 (1918).

"The use of interstate transportation was necessary to the accomplishment of harmful results. . . . This element is wanting in the present case. . . . When offered for shipment, and before transportation begins the labor . . . is over, and the mere fact that they were intended for interstate commerce transportation does not make their production subject to federal control under the commerce power."

The Court proceeded, in essence, to defend the right of states to determine labor conditions within their boundaries. As the Court opined, there were many reasons why local laws of various states would vary so as to give one state economic advantage over another. Although this condition was held to be true, the Court stated that "the commerce clause was not intended to give to Congress a general authority to equalize such conditions."

In closing their justification of the denial of the federal child labor regulation, the majority repeated that the necessary effect of the prohibition on transportation was to regulate the hours of labor of children—"a purely state authority." Thus, it was held that the act violated the Constitution on two counts: "It not only transcends the authority delegated to Congress over commerce, but also exerts a power as to a purely local matter to which the federal authority does not extend." For good measure and perhaps to try to convince themselves of the validity of their position, the Court added the admonition frequently used that a validation of the law might mean an end to our form of government. In their words:

"The far reaching results of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed."

It is interesting to note that the majority agreed that there should be control of child labor: "That there should be limitations upon the right to employ children in mines and factories in the interest of their own and the public welfare, all will admit." But the fact that many of the states were derelict in their duty of enacting adequate controls did not convince them of the need for another approach. The law of North Carolina, for example, at the time that the case was brought into court from that state, allowed children aged twelve and older to work. But this Court decision, like many others, is not notable for its recognition of social and economic needs.

As might be expected by anyone acquainted with the philosophy

of Mr. Justice Holmes, that jurist dissented; his opinion was concurred in by three other Justices. The dissent was powerful and to the point. In the view of the dissenters, Congress acted within its powers:

"The statute confines itself to prohibiting the carriage of certain goods in interstate or foreign commerce. Congress is given power to regulate such commerce in unqualified terms. It would not be argued today that the power to regulate does not include the power to prohibit. Regulation means the prohibition of something, and when interstate commerce is the matter to be regulated, I cannot doubt that the regulation may prohibit any part of such commerce that Congress sees fit to forbid."

As to the contentions of the majority that the law invaded an area of authority left to the states, the dissenters agreed:

"The act does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state line they are no longer within their rights. If there were no Constitution and no Congress their power to cross the line would depend upon their neighbors. Under the Constitution such commerce belongs not to the States, but to Congress to regulate. It may carry out its views of public policy whatever indirect effect they may have upon the activities of the States. . . . The public policy of the United States is shaped with a view to the benefit of the nation as a whole. . . . The national welfare as understood by Congress may require a different attitude within its sphere from that of some self-seeking State."

The dissenting opinion is in itself a good evaluation of the position taken by the majority. It is clear that the Congress did have, and has always had, the power to regulate interstate commerce. There seemed to be only one way in which the statute in question could be overthrown and that was to look behind the prohibition at the effects. It is true that the effects of the prohibition did impinge upon a field that was considered to be within the regulatory sphere of the state. But if the prohibition was clearly within the powers of the Congress, did the Court have the right to search behind the act and judge its effect as a basis of constitutionality? Almost any enactment of Congress will have some effect on actions and powers of the states. Especially in this case when the congressional action was, by the Court's own admission, for a desirable purpose it is difficult to understand the judicial reasoning.

It is also difficult to understand the reasoning by which the Court distinguished the validity of other prohibitions enacted under the

commerce clause from this one. The Court said that in the cases of lottery tickets, impure foods and drugs, and women for the purpose of prostitution, "interstate transportation was necessary to the accomplishment of harmful results"; in the opinion of the Court, this element was wanting in the child labor case. But was the distinction as clear as the Court would have persons believe? It is difficult to imagine that child labor would not have subsided markedly if goods on which children worked could not have been shipped out of the state. One difference could be cited between the prohibitions that had been validated by the Court and the child labor prohibition. In the other three cases the harmful results came after the transportation of the goods; in the case of child labor the evil that Congress sought to stamp out came before the movement of the goods across state lines. But such a distinction was not basic. In all four instances the prevention of the movement of goods in interstate commerce was a way of stopping a certain evil occurring before or after the movement of the person or goods. It cannot be argued reasonably that the chronological relationship of the evil to the time of the movement in commerce should determine validity or lack of it. Here, again, the Court leaned on an unconvincing argument.

#### The child labor tax case

While the dissent of Mr. Justice Holmes convinced one too few justices, it did speak the attitude of the public and of Congress. Proof of this contention came in the prompt passage of another federal law intended to control child labor. This law,<sup>5</sup> enacted in the same year as the invalidation of the first federal child labor law, went into effect in April, 1919. It imposed a tax of ten per cent on the net profits of any mining concern employing children under age sixteen and on any manufacturing concern employing children under age fourteen or those under age sixteen for more than eight hours per day or forty-eight per week. This tax was in addition to all other levies paid by the concern. This was the only other approach that the Congress could take to the problem. The only two powers that Congress can use to enact labor legislation are the power to regulate interstate commerce and the power to tax. The commerce power seemed to be the more logical approach, and it had been tried first but to no avail. Application of the taxing power was a further stretching of congressional prerogative, but it was the only remaining method.

In this case, again, it seemed that there was precedent for using the taxing power for reform purposes. Colored oleomargarine had

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<sup>5</sup> Revenue Act of 1918, 40 Stat. 1138, 1918.

been subjected to a discriminatory tax so heavy as to bar it from the market. Congress had used the same method, a discriminatory tax, to stop the production of matches containing white phosphorous<sup>6</sup> and to stop the circulation of state bank notes at an even earlier date. Thus, although the relationship of child labor to the tax was not so clear as that to commerce, there was precedent for the use of the taxing power to achieve social and economic regulation.

When the law went into effect, a citizen of North Carolina again rose to the occasion and the law was challenged. The background of the case was this: the Drexel Furniture Company had employed a boy of less than age fourteen and was charged over \$6000 for the taxable year of 1919 under the special provisions of the child labor tax law. The sum was paid under protest and the company asked for a refund, which was denied. Suit was then brought in the federal District Court in the Western District of North Carolina asking for the full amount of the tax paid plus accrued interest. The Court ruled in favor of the company and the case was appealed to the High Court.

In the federal Supreme Court the law was attacked as a regulation of the employment of child labor, which was contended to be purely a state function.<sup>7</sup> It was defended as simply an excise tax levied by Congress under its power to tax. As the Court saw it, the basic question was:

"Does this law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the so-called tax as a penalty? . . . If it were an excise on a commodity or other thing of value we might not be permitted under previous decisions of this court to infer solely from its heavy burden that the act intends a prohibition instead of a tax. But this act is more. It provides a heavy exaction for a departure from a detailed and specified course of conduct in business."

This passage is indicative of the final ruling of the Court, but other passages from or summaries of their reasoning are also of interest. It was pointed out that the establishment of an employer was subject to inspection by representatives of the Department of Labor as well as the Treasury Department. On that basis, Mr. Chief Justice Taft commented, "In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable."

<sup>6</sup> Millis, H. A., and Montgomery, R. E., *op. cit.*, Vol. I, p. 444. Commons, J., and Andrews, J., *op. cit.*, p. 195.

<sup>7</sup> *Bailey v. Drexel Furniture Co.*, 259 U. S. 20 (1922).

The Court implied a reluctance to invalidate the law saying, "We cannot avoid . . . duty even though it requires us to refuse to give effect to legislation designed to promote the highest good." A certain amount of regulation *mixed* with revenue raising would have been supported, so the Court said, since a measure did not lose its character as a tax because of an incidental regulatory effect. But the Court held that the penalty features were carried too far in this particular act.<sup>8</sup> To clinch their reluctance, the Court argued, "Grant the validity of this law and all that Congress would need to do, hereafter, in seeking to take over to its control any one of a great number of subjects of public interest . . . would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the states." For all the above reasons, the Court asserted that it "must hold the Child Labor Tax Law invalid."

Whether or not the Court was constrained to render the decision which they did, it must be admitted that the opinion seems much more reasonable and in keeping with constitutional provisions than did the *Hammer v. Dagenhart* ruling. If subsequent shifts in Court opinion are of any value, the Bailey ruling is more solid. Probably a similar case still would be held an invalid exercise of congressional power. On the other hand, the Hammer decision has not weathered the test. Subsequent rulings on the power conferred by the commerce clause have outmoded the dicta handed down in the Hammer case.

Despite its weakness, some liberals were inclined to defend the tax law out of sympathy for its objectives. Sensing this, Mr. Chief Justice Taft observed, "The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant or the harm which will come from breaking down recognized standards." Millis and Montgomery observe somewhat caustically that they were not prepared to deny this point. They were prepared, however, "to observe that the child labor decision . . . demonstrated how necessary is some modernization of this ark. . . ."<sup>9</sup> Such a comment is well-worth

<sup>8</sup> Millis, H. A., and Montgomery, R. E., *op. cit.*, Vol. I, p. 447, voice the opinion that if the tax had had some revenue collection feature to it, however slight, in case of observance it might have survived. They point out that the discriminatory tax on oleomargarine was very heavy for colored margarine and very light for uncolored. Therefore, although the heavy tax drove out colored margarine, there was still a slight tax on the other product, thus preserving the revenue feature.

<sup>9</sup> *Ibid.*, p. 448.



emphasizing. Presumably, what the Chief Justice meant by his flowery language was that validation of a law such as this would break with precedent and with customary methods of doing things. But there is a rather sad commentary therein. The Court held that it was its duty to invalidate legislation of an admitted value because of the fact that to do otherwise would break with our customs and traditions as to which level of government enacts a certain type of regulation. Here, as in the *Dagenhart* case, the Court was faced with the fact that many states were not competently doing their duty in regulating child labor. And, as Mr. Justice Holmes suggested in his dissent in the *Hammer* case, it might be to the economic advantage of some states, in the short run, not to regulate child labor adequately. Under such conditions, the Constitution and customs arising thereunder were held for a second time to preclude federal establishment of minima, with the states free to do as much better as they chose. Such a situation clearly justified the comment of Professors Millis and Montgomery that it was high time that some steps be taken to modernize "the ark of our governmental covenant" so that desirable social and economic legislation no longer be caught in the no man's land between inaction of certain branches of the government and constitutionally induced impotence of another branch.

#### The proposed constitutional amendment

Congress, with the *Bailey v. Drexel* decision, saw its second means of enacting labor controls invalidated. Since there was no other power that could be used under the Constitution, it was necessary to change the attitude of the Supreme Court or to amend the Constitution, if the federal government were to set standards for child labor. Not a great deal could be done in a short time about changing the attitude of the Court; therefore, Congress decided on an amendment to the Constitution. From 1922 to 1924 this plan was discussed, and in 1924 the following proposed amendment was submitted to the states for ratification:

"Sec. 1. The Congress shall have power to limit, regulate, and prohibit the labor of persons under 18 years of age. Sec. 2. The power of the several States is unimpaired by this article except that the operation of State laws shall be suspended to the extent necessary to give effect to legislation enacted by Congress."<sup>10</sup>

It will be noted that the proposal was an enabling amendment only. Perhaps that fact frightened many persons and state legisla-

<sup>10</sup> Quoted from: U. S. Bureau of Labor Statistics, Bulletin No. 616, *Handbook of Labor Statistics* (1936), p. 88.

tures or at least gave excellent talking points for the opposition. There was no limitation upon the industries that the Congress could regulate if it chose, and the specific wording of the proposal allowed the government to prohibit the labor of persons under age eighteen. In addition, the use of the word "labor" rather than "employment" allowed some persons to jump to the conclusion that the government could legislate to prevent persons from doing chores around the home, working on the parents' farm, and the like. Those who opposed missed no opportunity, and all sorts of dire predictions were made as to the effects of the proposal on the home and the church.<sup>11</sup> It was also labeled as an insidious foreign proposal.

Such well-organized and well-financed opposition was somewhat surprising, in view of the apparent public support of the measures previously enacted by Congress. It seemed logical to expect prompt ratification by the necessary thirty-six states. But those who were so optimistic failed to reckon with the effectiveness of the opposition. Perhaps still another matter might have been responsible for the reluctance of the states to ratify. That was the provision suspending the power of the states to the extent necessary to give effect to any legislation enacted by Congress once the enabling amendment was passed. This provision should not have been considered a threat; such a condition, whether stated or not, would have to be present in any instance in which both the state and federal governments sought to exercise control in the same field. Essentially, all that the provision said was that a state could not enact a regulation calling for lower standards than those of the federal government and expect the more lenient state law to take precedence. On the other hand, the state would have as much authority as ever to enact laws specifying higher standards than those of the federal law; in that case no harm would be done to the federal statute by enforcing the more demanding state law, and this could be done.

It is doubtful if the use of terms such as "labor" and "prohibit" or the avowed intent to suspend state laws that conflicted with federal law were the real reasons for the objections to the act. However, they did provide excellent talking points for its opponents. As a result of their opposition ratifications came very slowly and the amendment never became a part of the Constitution. During the six years following submission of the amendment to the states only five ratified it.<sup>12</sup> Colorado added her approval in 1931, and then nothing further happened until 1933. After 1930 the deepening of the de-

<sup>11</sup> For a discussion of the objections to the amendment see: Millis, H. A., and Montgomery, R. E., *op. cit.*, Vol. I, pp. 448-460.

<sup>12</sup> Arkansas, 1924; Arizona, California, Wisconsin, 1925; Montana, 1927.

pression and the inability of millions of adults to find work while many children were employed at extremely low wages caused a renewed interest in effective regulation of child labor. Consequently, fourteen more states<sup>13</sup> ratified the amendment in 1933 and two more in 1935, with final approvals by four more in 1937.<sup>14</sup> This brought ratifications to a close.

In view of the long time between the submission of the amendment to the states and some of the ratifications and the fact that some states first rejected and at a later date ratified, there was considerable question as to whether the amendment was still open for ratification. The Supreme Court ruled in 1939 on two cases arising out of this question; it held that the amendment was still open.<sup>15</sup> However, this now seems a moot question because the enactment of the federal Fair Labor Standards Act of 1938 accomplished essentially what the amendment had sought to validate. Although the child labor provisions of the enactment have not been ruled upon by the Supreme Court, other parts of the law have been approved. It seems reasonable to assume that federal child labor controls are here to stay and that there no longer is a need for ratification of the amendment of 1924; a change in court attitude could change this situation, however, since the child labor provisions could still be brought up for review.

### Child labor and the codes

Bringing the story of the failure to ratify the amendment up to date has taken us beyond two other attempts of the government to cope with child labor; it is necessary to return to these. The National Industrial Recovery Act, in its all-encompassing scope, contained provisions that dealt with child labor. The previously mentioned codes of fair competition contained minimum standards for child labor. Although these were not entirely uniform, age sixteen was the commonly accepted minimum for employment of children thereunder; however, a considerable number allowed children of age fourteen and fifteen to work for limited periods, and a few of the codes set minima of eighteen years. Altogether, 78.5 per cent of the codes set sixteen years as the minimum age in normal employment and eighteen years in hazardous occupations.<sup>16</sup>

<sup>13</sup> Illinois, Iowa, Maine, Michigan, Minnesota, New Hampshire, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Washington, and West Virginia.

<sup>14</sup> Indiana and Wyoming, 1935; Kansas, Kentucky, Nevada, and New Mexico, 1937. See: U. S. Bureau of Labor Statistics, Bulletin No. 616, *Handbook of Labor Statistics* (1936), pp. 38-39. See also: Raushenbush, C., and Stein, E., *op. cit.*, p. 404.

<sup>15</sup> *Coleman v. Miller*, 59 Sup. Ct. 972 (1939). *Chandler v. Wise*, 59 Sup. Ct. 992 (1939).

<sup>16</sup> U. S. Bureau of Labor Statistics, Bulletin No. 616, *Handbook of Labor Statistics* (1936), p. 524.

Among the industries setting poorer standards than the average were most branches of the retail trade. Under the retail codes, it was common practice to allow children of fourteen and fifteen years to work up to three hours daily on school days and one eight-hour day each week. The daily-newspaper codes usually allowed nearly the same provisions. There was no special type of occupation that provided for a higher age minimum; among the very small number of fields setting eighteen years were: wrecking and salvage, concrete masonry, concrete pipe manufacturing, burlesque theatres, and locomotive bearings and castings.

The effect of the codes was to curtail sharply the extent of child labor. A report to the twenty-first annual convention of the International Association of Government Labor Officials in 1935 gave the following picture:

"In 1932, before the N.R.A. became effective, 50,023 employment certificates issued for children 14 and 15 years of age leaving school for their first full time employment were reported by the officials of 18 States and 69 cities. In 1934 the number of employment certificates issued in these same States and cities had fallen to 13,963, a decrease of 72 per cent from 1932. Those who left school for work in 1934 for the most part went into domestic and personal service and various miscellaneous employments not covered by the N.R.A. In 1932, 49 per cent of the children for whom occupation was reported went into manufacturing and mercantile work; in 1934, only 4 per cent. On the other hand, in 1932, 30 per cent entered the occupations classified by the census as domestic and personal services; in 1934, 81 per cent."<sup>17</sup>

The conference at which the above report was made was held only a few months after the Schechter ruling had invalidated the codes. However, the evidence was coming in even at that time that child labor was again on the increase. For example, one state that had issued no employment certificates in 1934 issued fifty-six within three months after the codes were suspended; in another state the rate of issuance in the first three months was about eighteen times as fast. In addition, a sizable number of these newly hired children were going into manufacturing again.

Such a record is clear proof that, in child labor as in other areas of labor problems, the N.I.R.A. codes were a relatively effective measure and that they met a need not being taken care of by the states. Their suspension was a severe blow to the proponents of progressive labor legislation, and their effects were soon lost, al-

<sup>17</sup> U. S. Bureau of Labor Statistics, Bulletin No. 619, *Labor Laws and Their Administration*, pp. 14-15. Washington, D. C.: U. S. Government Printing Office, 1936.

though they did have some permanent effects on child labor because they focused attention on the problem and some states revised their statutes to bring them in line with the federal standard. However, most of their benefits disappeared about as quickly as they came.

### Child labor and public contracts

The Schechter ruling left the Congress with little recourse regarding child labor controls. Its two ordinary means of economic control, through commerce regulation and the taxing power, had for this matter long since been discarded, the states had failed to ratify the proposed amendment in sufficient number, and the N.I.R.A.'s attempt at broad emergency controls had been overruled. Unless there could develop in the Supreme Court some change of attitude toward economic controls, there seemed to be no means of reaching the general employers of child labor. It was possible, however, to set labor standards that were required of federal contractors; this Congress did in 1936.

The Walsh-Healy Public Contracts Act dealt with the employment of child labor as well as general wage and hour matters for government contractors. As for child labor, contractors supplying the government with goods or services of value in excess of \$10,000 were forbidden to employ male persons under sixteen years of age and females under eighteen. This prohibition was not against all employment of child labor by the contractors; it applied only to such employment "in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in such contract." As with other sections of the law, it did not apply to the supplying of agricultural commodities or to the rendering of many services. In addition, other industries that, along with agriculture, are heavy users of child labor, such as retail trade and newspapers, were not under the coverage of the act.

The Walsh-Healy Act has remained on the statute books, but it was the only federal child labor law of any importance to come unscathed by the courts out of twenty years of congressional attempts at control. And in view of its restricted coverage, efforts at federal child labor control between 1916 and 1936 can be labeled as nearly fruitless.<sup>18</sup>

<sup>18</sup> One other interesting though restricted federal effort at child labor control may be mentioned. The Sugar Act of 1936, 50 Stat. 903, provided for the payment of certain cash benefits to sugar growers, the payment being conditioned upon the observance by the growers of certain rules. One of these rules was that benefits were denied either if children under fourteen were employed or if those between fourteen and sixteen worked more than eight hours daily. This rule did not apply to children working on their parents' crops.

### Current state controls of child labor

During this period the states were gradually revising their laws on the subject. Although all states had taken some action to regulate and control child labor before the Dagenhart decision in 1918, there was much room for improvement. Gradually, out of the exchange of experience a somewhat discernible pattern of regulatory laws began to develop, although the standards set have continued to vary widely even to the present day. In the 1930's a few of the states began to amend their laws so as to include agricultural employments. While at that time only two states, Montana and Ohio, had established a basic minimum age of sixteen years, a dozen others had stepped up to that standard by 1941.<sup>19</sup>

Probably the greatest problem area for child labor in the 1930's, and in the 1940's as well, was agriculture. For some reason, the work of children on farms is usually viewed as healthful outdoor work that helps the parents around the home. But many thousands of children now work on mechanized farms that are not the old homestead, and they are no more than gainfully employed child labor. Some of the children are extremely young; a New York study in 1940, made on one hundred truck farms, showed that almost forty-five per cent of the workers were children under sixteen years of age and nine per cent were under age ten. Usually the hours of work of such children were the same as for adults, and some of the work was quite heavy.<sup>20</sup> Although a few state laws and one limited federal enactment have stepped into this field, it has been largely untouched, as have other agricultural matters by all labor contracts.

A survey of the state controls of child labor in effect in 1948 is in order.<sup>21</sup> The major types of provisions found in the laws will be noted first, with more detailed data and variations from the norm noted subsequently. Perhaps the most important single provision in the laws is of the minimum legal age at which a child may take a job. It is rather common for these minima to be higher during school hours than at other times. Not infrequently certain age requirements may be waived if specified educational accomplishments have been attained or if it is determined that the child is unable to profit from school.

<sup>19</sup> Connecticut, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Utah, Wisconsin, Massachusetts, West Virginia, New Jersey, and Florida.

<sup>20</sup> For a report on child labor in agriculture see: U. S. Bureau of Labor Statistics, Bulletin No. 694, *Handbook of Labor Statistics*, Vol. I, pp. 31-36. Washington, D. C.: U. S. Government Printing Office, 1942.

<sup>21</sup> Drawn from: Division of Labor Standards, U. S. Department of Labor, *State Child-Labor Standards*. Washington, D. C.: U. S. Government Printing Office, 1946.

In addition to a minimum age, it is common to limit the number of hours per day and per week that a young person can be employed. Also, the laws often prohibit work during certain hours of the night. Many states forbid the employment of children below a certain age, usually one higher than the general basic minimum, in hazardous occupations.

Almost all state laws now use the administrative device of requiring young workers to obtain a work permit or employment certificate as a prerequisite of employment. These certificates usually are issued by local public school officials, although in some cases Department of Labor employees grant them. They are issued to certify that the child to whom granted has attained the necessary age and in any other required particular meets the stipulations for employment. When certificates are carefully issued, they protect an employer against unwittingly hiring a child below the legal age and aid in keeping minors from work from which they are barred by law because of occupational or other hazards.

In addition to state legislation directly controlling the employment of children, laws requiring school attendance affect employment. All states have some compulsory school-attendance law, but many of them permit exceptions for various reasons, thus weakening their effectiveness.

The minimum age at which children are allowed to go to work in non-hazardous employments is usually fourteen or sixteen years, with a few states setting fifteen years. The one state specifying no minimum age is Wyoming, in which the only stipulation is that no child required to be attending school may be employed during school hours. The greatest number of states set age fourteen as the minimum; twenty-seven states have so legislated,<sup>22</sup> and Delaware might be added to this list because it permits boys to work who are twelve or over, if not required to be in school and if not employed in dangerous industries; otherwise fourteen years is the minimum age. A smaller but sizable number set sixteen years as the minimum age in non-hazardous work.<sup>23</sup> Three states, Califor-

<sup>22</sup> Alabama, Arizona, Arkansas, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, Vermont, Virginia, and Washington. By a 1947 enactment, Connecticut set fourteen years as the minimum age for children employed in agriculture; the act applies only to employers whose average number of employees is more than fifteen. See: Acee, Alfred, "State Labor Legislation in 1947." *Monthly Labor Review*, September, 1947, Vol. 65, No. 3, p. 277.

<sup>23</sup> Connecticut, Florida, Georgia, Louisiana, Massachusetts, Montana, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Utah, West Virginia, and Wisconsin.

nia, Maine, and Texas, bridge the gap between the two groupings by setting a minimum age of fifteen years.

The majority of the state laws handle employment in hazardous occupations separately and set higher standards for occupations so classified. Twenty-nine states set age eighteen as the minimum in a number of hazardous occupations. A list of such employments is likely to include industries, like underground mining, that may be dangerous from a physical standpoint, tasks in which the employment of the very young may be dangerous to others, such as a hoisting engineer, and occupations that may threaten the morals of children, such as work in billiard rooms or in street trades. The number of occupations listed as hazardous varies from one or a very few to a comprehensive listing. A considerable number of states that set general minima or fourteen years establish sixteen years for hazardous work, and a few have only a flat sixteen-year limit with no special provisions for the hazardous occupations. Altogether, fifteen states set sixteen-year minima for hazardous work. Two states, New Hampshire and Mississippi, make no provision for hazardous occupations. A few other states make some special provision for hazardous work that falls into no particular category.

Nearly half of the state controls make some distinction between the minimum age during school time and after hours or during vacation. The rather common variation in the latter instances is to permit employment two years younger than the basic minimum. It is not infrequent for a provision to be added to such an exception specifying the types of work in which the younger person may be employed. The specific exemptions in non-school time may be for persons working in agriculture or "not in manufacturing."

Another important set of provisions at the time of writing concerns the maximum hours of work allowed per day and per week as well as the regulations or lack of them of night work by minors. For convenience in examination these will be broken down into three groupings, hours per day, hours per week, and regulation of the hours during which child labor may be performed.

Provisions regarding hours of work per day and per week are not readily summarized because frequently there will be more than one set of limits that apply to various industries or at various times or that distinguish between the sexes or on the basis of the age of children employed. In the following summary, the basic day and week that seems applicable to child labor as the term is used in the particular state law is presented. The great majority of the states, forty-four in all, specify an eight-hour day; Idaho allows nine, Michigan and South Dakota ten, and New Hampshire ten and



one-quarter hours daily. As noted above, most of the states have some other provision than a flat eight-hour day for all children under a certain age. Frequently industries like domestic service or agriculture are not covered, and special provisions may be made for longer hours during rush seasons in canneries or in mercantile establishments. Despite the exceptions, most of the states are giving at least lip service to the eight-hour day for working children.

The work week is not quite so well-standardized, although the forty-eight-hour week is quite common. Altogether, twenty-six states provide for a forty-eight-hour week; in effect, Illinois and Washington are in the same category because they set an eight-hour day and six-day week without a maximum number of hours per week. Seven states have done considerably better by their working children by setting a forty-hour work week.<sup>24</sup> Wisconsin is the only state that has gone beyond this standard appreciably; it sets an eight-hour day and twenty-four-hour week for boys under sixteen and an eight-hour day and forty-hour week for those between sixteen and eighteen years. Eight states have set forty-four hours as the maximum work week for employed youths.<sup>25</sup> On the other hand, a small number of states have not come up to the forty-eight-hour weekly standard. Four states still allow as many as fifty-four hours as the basic work week for children.<sup>26</sup>

Slightly more than half of the states specify the maximum number of days of work per week. Of these, twenty-seven set a six-day week. South Carolina sets a five-day week for those employed in or around silk, rayon, or woolen mills, and Pennsylvania lowers its stipulation of six days for boys to five one-half for girls. The other states do not make any provision as to the number of days per week.

One interesting fact may be noted when examining the above provisions. In general, the southern states have set higher legislative standards than have the other states. Except for Wisconsin, New Jersey, and Rhode Island (possibly West Virginia), the states that have set a forty-hour work week are southern states; the same is true of some of those setting forty-four hours per week. Although exemption of certain occupations, like agriculture and domestic services, may weaken the effectiveness, this has not been a problem of the South alone. The relatively high legislative standards of the southern states in this connection are the more surprising in view of the opposition toward federal controls shown by court cases testing the two federal child labor laws.

<sup>24</sup> Alabama, Florida, Georgia, New Jersey, North Carolina, Rhode Island, and West Virginia.

<sup>25</sup> Louisiana, Mississippi, New Mexico, New York, Oregon, Pennsylvania, Utah, and Virginia.

<sup>26</sup> Arkansas, Idaho, New Hampshire, and South Dakota.

The other significant problem of work time for children is the hours during which they can be employed. While night work may be harmful to most persons, it presents especial problems for women and children. The health of children, their ability in school, and their moral standards all may be quite adversely affected by night work. Recognition of this fact has led the states to include in their laws provisions as to the legal hours for the employment of children. Let us examine the general provisions of the laws in effect in 1948 on this subject.

As with hours-of-work provisions, there usually are two or more provisions with respect to night work for children, varying on the basis of age, or sex, or both. The common requirements of the laws forbid work between 6:00 or 7:00 P.M. and 6:00 or 7:00 A.M. Occasionally, the limit in the evening is 8:00, 9:00, or, in a few cases, 10:00 o'clock; New York, with its 5:00 P.M. limit in factories, is the only state setting a limit earlier than 6:00 P.M. Almost all the morning limits are 6:00 or 7:00 A.M., with five 5:00 A.M. limits. Two states have no morning limit, setting an evening restriction but allowing work to begin at any time. Only one state, Montana, fails to make any provision with regard to night work.

The limits noted above apply in most cases to children under sixteen years of age, sometimes to boys under sixteen and girls under eighteen. In many of the laws the limits do not apply in agriculture and domestic service, and occasionally other exemptions are made. In addition to the basic night-work restrictions, it is a common though not universal practice to set a second pair of limits for children under eighteen, especially for girls under that age in specified occupations. These limits usually are from 10:00 P.M. or later until about the same morning hours as noted above.

Some of the states, approximately one-half, set up some special provisions governing employment in street trades, such as the sale of newspapers and magazines, shining shoes, and the like. Special protection is granted normally in the form of prohibition of employment under specified ages; usually boys may not be so engaged under age ten or twelve and girls under sixteen or eighteen. In 1946 twenty-five states had no such provisions in their laws. The general situation on this point was that the states with the largest urban populations were those which had enacted the special protection. There were exceptions to this "rule," however; for example, in Connecticut, Illinois, and Ohio where no special provisions had been made.

The use of employment certificates need not be examined in detail since it is a problem of administration; however, since good administration is important to the effective functioning of any law this

matter may be noted briefly. All of the states except five<sup>27</sup> use these certificates as requirements for employment of children in some or all occupations; 29 states require them for children under 16 in some or all occupations; 14 states have a similar requirement for children under 18. Although it would be possible to have a smoothly working law without certificates and a poorly working one with them, some person or agency not personally interested in the employment of a child should be required to pass on the legality of the employment of the person for whom a certificate is requested. In a heavy majority of the cases these certificates are issued by local public school officials.

While there are other state regulations that affect child labor, there is only one more general area which will be noted at this point. The requirement of attendance at school is of importance and interest since it affects the availability of children for employment. All states have some regulations on this subject. The majority of the states set age seven to sixteen years as the period during which full-time school attendance is required. Some states have dropped the minimum to age six or raised it to age eight and several have set the maximum at eighteen. In all cases there are some exceptions to the application of the law to all persons within the age group. The most common exception is of persons physically or mentally incapacitated; such a term could mean much or little, depending on the way it is interpreted and enforced. Another common exception is of those persons who have completed a certain level of schooling, usually either the eighth grade or a regular four-year high school course. A variety of other exceptions is found in the various laws. In some cases children whose parents are so destitute that they cannot provide them with decent clothing have been excused, and special allowances have been made in some laws when the child's labor is necessary for the support of the family.

These school attendance laws are not in themselves child labor laws, but they have an effect on the employment of children. Where many exceptions are made to the laws, the employment of children will be more common. Laws on school attendance, coupled with other state controls that limit the amount of child labor during school terms have considerable effect when combined.

#### Improvements needed in child labor controls

From this survey of legislation affecting child labor it is clear that for many years both federal and state governments have recognized the problem of child labor and have tried, with varying degrees of

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<sup>27</sup> Idaho, Mississippi, South Carolina, Texas, and Wyoming.

vision and success, to control its worst features. Great strides forward certainly have been taken in the control of the employment of children in many industries, although, as will be shown later, the standards set by many of the states are far from entirely acceptable. Before noting, however, the weakness of the laws in the industries to which they do apply, it is well to recall that certain industries are exempted from coverage. Many of the laws do not cover agriculture or domestic service. Except for difficulties of administration, there is no good economic or social reason for this exemption, and the sooner state and federal governments can see their way clear to including these occupations in labor laws, the better. In these industries, child labor, low wages, long hours, and unsafe working conditions are widespread and little control is exercised thereon. Nor do the mythical advantages of farm labor prove to be representative of the work actually done, especially by child labor, on many of the large scale mechanized farms today. Much of the work on farms is just as tiring and as dangerous as many jobs in industry. Tradition, the heavy representation of rural areas in Congress and state legislatures, and effective lobbying rather than an absence of need have been responsible for the inapplication of most economic controls to agriculture.

But even where the regulations do apply, many of them do not measure up to desirable standards. The International Association of Government Labor Officials has set up what are considered to be minimum standards that should be met by any child labor law. The goals set are in no way excessively high; it seems reasonable to take them as a basis for judging the adequacy of present laws. Such an analysis has been prepared in summary form by the Division of Labor Standards of the U. S. Department of Labor and is reproduced on page 264.

Examination of the summary of the Division of Labor Standards stresses the inadequacy of present controls. This is true of every standard set, for in every case only a minority of the states measure up to the suggested level. It is difficult to evaluate the shortcomings. However, the failure of most states to prohibit full-time work by children under age sixteen is especially objectionable. If the nation hopes to keep a reasonably well-educated labor force and one that in the long run is healthy and efficient, full-time employment at less than a certain age, perhaps sixteen, should be ruled out, and part-time employment, especially during the school year, should be carefully regulated.

The eight-hour day and forty-hour week, standards that have become rather commonplace for adults, are quite reasonable maxima for child labor. While the eight-hour day is not especially uncom-

MAJOR STANDARDS RECOMMENDED BY THE INTERNATIONAL ASSOCIATION OF GOVERNMENTAL  
LABOR OFFICIALS FOR STATE CHILD LABOR LEGISLATION AND THE EXTENT TO  
WHICH EXISTING STATE CHILD LABOR LAWS MEET THESE STANDARDS

	I.A.G.L.O. Standards	Extent to Which State Child Labor Laws Meet I.A.G.L.O. Standards
<i>Minimum Age</i>	16 years, in any employment in a factory; 16, in any employment during school hours; 14, in nonfactory employment outside school hours.	18 States and Puerto Rico approximate this standard in whole or in part (Ala., Conn., Fla., Ga., Ill., La., Mass., Mont., N. J., N. Y., N. C., Ohio, Pa., R. I., S. C., Utah, W. Va., Wis.)
<i>Hazardous Occupations</i>	<i>Minimum age 18</i> for employment in a considerable number of hazardous occupations.  State administrative agency authorized to determine occupations hazardous for minors <i>under 18</i> .	Few, if any, States extend full protection in this respect to minors up to 18 years of age, though many State laws prohibit employment under 18 in a varying number of specified hazardous occupations.  20 States, D. C., Hawaii, and Puerto Rico have a State administrative agency with such authority (Ariz., Colo., Conn., Fla., Kans., La., Maine, Mass., Mich., N. J., N. Y., N. C., N. Dak., Ohio, Oreg., Pa., Utah, Wash., W. Va., Wis.)
<i>Maximum Daily Hours</i>	8-hour day for minors <i>under 18</i> in any gainful occupation.	12 States, D. C., and Puerto Rico have an 8-hour day for minors of <i>both sexes</i> under 18 in most occupations (Calif., La., Mont., N. J., N. Y., N. Dak., Ohio, Oreg., Pa., Utah, Wash., Wis.) 7 other States have this standard <i>for girls</i> up to 18 (Ariz., Colo., Ill., Ind., Nev., N. Mex., Wyo.)
<i>Maximum Weekly Hours</i>	40-hour week for minors <i>under 18</i> in any gainful occupation.	2 States (N. J. and Wis.) and Puerto Rico have a 40-hour week for minors <i>under 18</i> in most occupations; 4 States (La., Oreg., Pa., Utah) a 44-hour week for such minors. 1 of these States (Wis.) has a 24-hour week for minors <i>under 16</i> ; 6 other States (Ala., Fla., Ga., N. C., R. I., W. Va.) and Hawaii have a 40-hour week, and 4 others (Miss., N. Mex., N. Y., Va.) a 44-hour week for such minors.
<i>Work During Specified Night Hours Prohibited</i>	13 hours of night work prohibited for minors of both sexes <i>under 16</i> in any gainful occupation.  8 hours of night work prohibited for minors of both sexes <i>between 16 and 18</i> in any gainful occupation.	12 States, Hawaii, and Puerto Rico meet or exceed this standard, at least for most occupations (Iowa, Kans., Ky., N. J., N. Y., N. C., Ohio, Okla., Oreg., Utah, Va., Wis.)  11 States, D. C., and Puerto Rico meet or exceed this standard, at least for most occupations (Ark., Calif., Conn., Fla., Kans., La., Mass., Mich., N. J., Ohio, Wash.)
<i>Employment Certificates</i>	Required for minors <i>under 18</i> in any gainful occupation.	21 States, D. C., Hawaii, and Puerto Rico require employment or age certificates for minors <i>under 18</i> in most occupations (Calif., Conn., Fla., Ga., Ind., La., Mass., Mich., Mont., Nev., N. J., N. Y., N. C., Ohio, Oreg., Pa., Tenn., Utah, Wash., Wis., and, where continuation schools are established, Okla.). One other State (Ala.) requires such certificates for minors <i>under 17</i> . (A few of these States require certificates for minors 18 years of age or over, at least in certain occupations.)

mon, the forty-hour week is almost non-existent. Although some organizational problems may develop because young persons are not permitted to work as long as a plant or place of business operates, there are pressing social and economic problems involved when excessive hours of work are allowed. Failure of so many states to meet this weekly standard is hard to understand and even more difficult to justify.

It is somewhat disconcerting to note that the standard to which the states best measure up is that of the use of employment certificates. While the techniques of administration are of importance to the effectiveness of legislation, it is certainly as important, if not more so, that the law set reasonable, adequate standards to be applied through these administrative techniques.

In view of the failure of the federal government, up to the late 1930's, to find a means of widespread regulation of child labor and of the wide variation in and obvious inadequacy of state controls, there was a continuing need of legislation that would standardize and improve controls as much as possible. To some extent, this came with the enactment in 1938 of the Fair Labor Standards Act. That law, in addition to more extensive regulations of hours and wages, again set up federal controls of child labor. Since wage, hour, and child labor controls by the federal government have been traced up to 1938 and those of the states carried to the post-World War II period, it is time now to complete the study of these regulations with an examination of the Wage-Hour Law.

### Questions

1. In view of the fact that the states had enacted child labor controls prior to 1916, was there good reason for the attempts at federal control?
2. Evaluate the reasonableness, logic, and social philosophy shown in the majority and dissenting opinions in *Hammer v. Dagenhart*.
3. Agriculture is largely exempted from the application of child labor laws. Is such an exemption defensible?
4. What effect, if any, will effective child labor regulation have on the wages and employment opportunities of adult workers?
5. What do you consider an adequate program of government controls over child labor? What subjects would it cover? Should it be state or federal legislation, or both?
6. In view of the regulatory powers granted the federal Congress by constitutional provisions, does the *Hammer v. Dagenhart* or the *Bailey v. Drexel* decision seem the more defensible? Do you think both would be ruled on today as they were originally?

## CHAPTER XIV

### THE FAIR LABOR STANDARDS ACT

#### Reasons for enacting the Fair Labor Standards Act

The Fair Labor Standards Act is, as of 1948, the final chapter in the long story of federal attempts to control wages, hours, and child labor. In each of these areas of control there had been one or more attempts at regulation that had failed because of Supreme Court rulings. Despite failures, the Roosevelt administration continued to try by one means or another to salvage portions of the recovery program that had been disallowed by the Schechter and other decisions. Under this program of reenactment, the guarantees of the right to organize had been reestablished in the National Labor Relations Act of 1935. Some control over wages, hours, and child labor had been replaced in the Public Contracts Act, but the coverage of this act depended on the purchases of the government. In 1937 the Supreme Court, as will be seen in a later chapter, had sanctioned a very broad interpretation of congressional power under the commerce clause.<sup>1</sup> Congress sought to use this power as a basis for the broader regulation needed in the wages, hours, and child labor areas.

The finding and declaration of policy stated by Congress prior to the body of the Fair Labor Standards Act shows the attempt to capitalize on the broader concept of the commerce power. The statement was:<sup>2</sup>

"(a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

<sup>1</sup> Jones and Laughlin Steel Corporation decision. See below, Ch. XVII.

<sup>2</sup> The act is found in 52 Stat. 1060. Quoted are the Findings and Declaration of Policy.

"(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power."

Such was the window dressing that Congress included for the benefit of the Courts; the obvious purpose was to prove that there was sufficient relationship between the subject regulated under the act and the free flow of interstate commerce to give Congress the authority to enact the control. It will be noted that the act imposed regulations both on industries engaged in commerce and on those engaged in the production of goods for commerce. An attempt to extend the power over commerce in such a manner prior to 1937 would have been thought unconstitutional, but it was in keeping with the concept of the commerce power laid down by the Court in the decision validating the National Labor Relations Act.<sup>3</sup>

#### Coverage of the act

Despite the stated broad interest in industries producing goods for commerce, it will be seen that the act contained a considerable number of exceptions. Although not all of these need be noted, the more significant ones should be. The sections of the act that dealt with minimum wages and maximum hours did not include the following: (1) *bona fide* executive, administrative, or professional personnel; (2) local retailing and outside salesmen or employees of local retailers the greater part of whose sales are intrastate; (3) seamen; (4) any employee of a carrier by air subject to appropriate sections of the Railway Labor Act; (5) fishery workers; and (6) agricultural workers. There were other minor exemptions of persons who might have been held to be in industries producing goods for interstate commerce. In addition, persons who were not so engaged, such as those in local transport, domestic work, or government service, were not covered. As to the section dealing with child labor, it was not applicable to children employed in agriculture, those not legally required to attend school, or to any child employed as an actor in motion pictures or theatrical productions. Such a number of statutory exemptions has required many interpretations in order to clarify the applicability of the law; the more important ones will be noted later.

With regard to coverage, one other matter should be noted; the act covers employees and not employers. By this is meant that

<sup>3</sup> *National Labor Relations Board v. Jones and Laughlin Steel Corp.*, 301 U. S. 1 (1937). See below, Ch. XVII.



only the workers whose duties are an activity affecting commerce or the production of goods for commerce are included. Thus, an employer may have certain employees who are subject to the act because of their duties and others not subject to the law because their duties are not essential to commerce or the production of goods for commerce. If the exemptions noted above present complex questions of interpretation, the determination of when a certain worker or class of workers should and should not come under the act is even more complex. Here, again, a number of interpretations must be noted subsequently.

### Wage provisions

The passage of the Fair Labor Standards Act was intended to raise the legal minimum wage to forty cents per hour and to discourage employment beyond forty hours per week, as soon as possible. However, in view of the fact that even this low standard was such as to require marked improvement on the part of some employers, the attainment of it was to come by stages rather than in one jump. For example, the minimum-wage provisions of the act were to become effective 120 days after enactment, in October, 1938. The legal minimum-wage rate for the first year was twenty-five cents per hour. During the next six years the minimum was thirty cents hourly; finally, after seven years, in October, 1945, the forty-cent hourly minimum was to be established.

The final forty-cent minimum could be reached, however, prior to October, 1945, and, as a matter of fact, it was reached in all industries subject to the act before that time; final orders establishing the minima were effective in July, 1944, almost fifteen months prior to the deadline.<sup>4</sup> The more rapid attainment of the final minimum was accomplished as a result of the provision for industry committees. These committees were appointed by the administrator for all industries producing goods for commerce or engaged in commerce; they were composed of equal numbers of labor, management, and public members appointed with due regard for the regions in which the industry was carried on. One of the public members was chairman of each committee.

The job of each industry committee was to study the industry in question, its wages, working conditions, and all pertinent figures, and recommend to the administrator a minimum that they thought feasible, not less than thirty nor more than forty cents per hour. Before the recommended rate could be put into effect, a public hearing was required at which the interested parties were to be

<sup>4</sup> Prentice-Hall's *Complete Labor Equipment*, Vol. 1, *Wage and Hour*.

heard. If, after the hearing, it appeared that the proposed rate was practical and that substantial unemployment would not result therefrom, the administrator could issue an order putting it into effect.

The wage orders of the industry committees were not to be applied to Puerto Rico or the Virgin Islands. For those areas special committees were to be appointed from residents, and rates to be effective there were to be recommended with an eye to the particular territorial problems. The primary restriction on the rates set was that they should not be such as to give an industry in Puerto Rico or the Virgin Islands a competitive advantage over industry in other parts of the United States.<sup>5</sup>

One exception to the wage minima, other than that for the island areas mentioned above, was made for learners, apprentices, and handicapped persons. Under special certificates issued on the basis of regulations by the administrator, such persons could be employed "at . . . wages lower than the minimum wage applicable . . . and subject to such limitations . . . as the Administrator shall prescribe." Such a provision was essential; otherwise, an unreasonable restriction on the job opportunities for the young and the handicapped would have resulted. Although during the war almost anyone could find work at well over the forty-cent legal minimum, it must be borne in mind that the Fair Labor Standards Act was a depression measure enacted when the majority of Congress and the public was not thinking in terms of another war and its effects on the labor market. In a depression period, when there is unemployment, a learner or a handicapped person may be able to find work only if he makes a concession on wages. In economic terminology, they are the marginal or least desirable workers, who may have to offset their lack of ability by working for low wages.

### Hours provisions

In reality, the section of the law that sets forth the provisions with regard to "maximum hours" does not set maximum hours at all. Rather, the law specifies a basic work week and requires that persons subject to the act and employed for longer than the basic week must be paid for the time in excess of that basic work period at a penalty rate. There has been considerable confusion in the public mind, especially during the wartime labor shortage, as to the actual provisions of the "maximum hours" section of the law. It does not

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<sup>5</sup> Special provision was made for home workers in Puerto Rico and the Virgin Islands. In these areas piece rates sufficient to yield the minimum hourly rate could be set by representatives of the wage-hour administration. Representatives of the administrator could prescribe methods of determining the piece rates and the class of employees to receive them.

set a maximum number of hours that can be worked, and it could not prevent employers during the wartime labor shortage from requiring much more work time than the basic work week. It is true that the law made such employment more expensive, but it did not prohibit it.

Like the minimum wage, the final standard on hours was to be reached by stages. Once the act became effective, a maximum basic week of forty-four hours was set for the first year; for the second year this was lowered to forty-two hours, and for the third year and thereafter it was forty hours. Thus, the final goal on hours was to be reached in October, 1940, five years prior to attainment of the final wage level. It should be noted that the hours provisions mentioned above did not affect the number of hours per day in any way. As far as the law is concerned, with the one exception discussed in the next paragraph, a person could be worked around the clock without penalty rates being required unless the weekly hours went beyond the forty-hour maximum.

The one case in which basic hours per day were set was in industries "found by the Administrator to be of a seasonal nature." In such occupations employees could be worked for twelve hours daily and fifty-six weekly for not more than fourteen work weeks in a calendar year without being paid at penalty rates. The definition of a seasonal industry was so drawn as to prevent ordinary mercantile or manufacturing enterprises from taking advantage of this provision on the basis of the rush of business that they experienced from time to time. To be considered seasonal, industries had to be deprived of employment at certain times as a result of natural or climactic conditions.

Aside from the broad exemption of certain industry groups, there were two other general exceptions from the hours provisions. Although these exceptions have not yet been very significant, current trends in collective bargaining demands indicate that they might in time become more important. These exceptions were that no employer should be held to have violated the act if he allowed his employees to work longer than the basic work week if such employment was:

"(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand hours during any period of twenty-six consecutive weeks.

(2) on an annual basis in pursuance of an agreement . . . made as a result of collective bargaining . . . which provides that the employee shall not be employed more than two thousand and eighty hours during any period of fifty-two consecutive weeks."

It will be seen that these provisions left the way open for unions and employers to agree on some sort of annual wage plan. Where agreements are made to pay certain classes of workers a set number, perhaps fifty, of pay checks for a full week's work over a twelve-month period, some arrangement is needed to cancel short and long weeks of work while paying a regular check each week regardless of fluctuations in hours of work in any one week.<sup>6</sup> Although there are many problems involved in the development of guaranteed annual wage plans, the desire therefor is increasing; the exception was very desirable, for otherwise such a balancing of work time would not have been permissible.

In addition to the above exceptions, the hours provisions were not to apply to employers doing the first processing of milk products, cotton or cotton seed, sugar beets, sugar cane, or maple sugar. And during fourteen weeks per year the provisions were not applicable in canneries and meat-packing establishments. All in all, the hours provisions of the law left much to be desired; there were many exemptions, and for persons covered by the act the provisions were not for maximum hours but for basic hours.

### Child labor provisions

The child labor provisions of the law were brief and bring to mind the first attempt by Congress to control child labor through the commerce clause. The gist of the provision was that, after the act became effective, "no producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed." Oppressive child labor was defined as the employment of "(1) any employee under the age of sixteen years . . . or (2) any employee between the ages of sixteen and eighteen . . . in any occupation which the Chief of the Children's Bureau in the Department of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well being."

### Violations and enforcement of the act

Such were the basic wage, hour, and child labor provisions of the Fair Labor Standards Act. Obviously, failure to obey these rules was a violation of the act. There were, however, a number of other actions that also were violations. For example, failure to abide by

<sup>6</sup> For a lengthy study of guaranteed annual wages, their nature, extent, and the problems involved therein see: Advisory Board, Office of War Mobilization and Reconversion, Latimer, Murray (research dir.), *Report on Guaranteed Wages*. Washington, D. C.: U. S. Government Printing Office, 1947.

an interpretation or regulation of the administrator was a violation. Also, any discrimination against an employee for filing a complaint or testifying under the act constituted a violation. Failure to keep or any falsification of records required under the act was another violation. Finally, this very significant prohibition should be noted. Once the act became effective, it was declared unlawful for any person:

"to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation."

This prohibition was an attempt to get some degree of self-policing or enforcement of the act. Under it, an employer who himself was innocent of any violation of the act could be held in violation if he knowingly transported, shipped, or sold goods that had been produced under conditions forbidden by the act. This prohibition is sometimes referred to as the "hot goods provision."

By what means could the provisions be enforced? This might be done by the use of criminal penalties, civil penalties, or injunction proceedings. A person found guilty of wilfully violating the act was subject to a fine of not more than \$10,000 or to imprisonment for not more than six months or to both. These were the possible criminal penalties. Under the civil penalties, an employer who violated the wage or hour provisions of the act was liable to be sued by his employees for their unpaid minimum wages or overtime. If the suit were successful, it proved to be rather expensive to the employer since he was made liable for the unpaid wages, for an equal sum as damages, and for a reasonable attorney's fee and costs—in other words, double wages and court costs. This particular provision should be kept in mind, since it served as the basis, along with an attempted redefinition of work time, for the great wave of "portal to portal" pay suits that were brought against employers in 1946 and 1947.<sup>7</sup> A third means of enforcement was by injunction. The District Courts of the United States were given authority to issue injunctions restraining violations of the act. This would mean, for ex-

<sup>7</sup> See below, Ch. XXV.

ample, that the courts could prohibit the shipment of goods, if there had been violations of the act, until wage restrictions or other remedial action had been taken.

### Constitutionality of the act

Two general subjects remain to be discussed in this presentation of the federal wage-hour law: the court interpretations of the act and the administrative applications of its provisions. Since no controversial law is fully effective and respected until it has been approved by the Supreme Court, it may be well first to note the opinions of that body concerning the act. These were not long in arising, the validity being tested before the Supreme Tribunal in two cases in 1941. It will be remembered that two or three years is required in most cases to bring an issue before the Court and receive an answer; the law in question was not enforced until the fall of 1938 and questions could not be started through the court hierarchy before that time.

The first case testing the law that was ruled upon by the Supreme Court was that of *United States v. F. W. Darby Lumber Company*.<sup>8</sup> It was argued before the Court in December, 1940, and the decision was rendered in February, 1941. A brief background of the case may be of interest. The Darby Company was producing lumber in Georgia. When charged with violating the wage and hour provisions of the act, it filed a demurrer contending that the law exceeded the powers granted Congress in the commerce clause because it sought to regulate intrastate business, that it took liberty and property without due process of law, a violation of the fifth amendment, and that it violated the tenth amendment by appropriating powers reserved to the states. When the District Court heard the case it supported the claim of the company and declared the act invalid. From that ruling the case was appealed to the Supreme Court.

In arguing for the validity of the law, the federal attorneys were faced with one precedent case that was hard to reconcile with the court action that they were asking in the case before the bar. They argued that the Fair Labor Standards Act was a regulation of interstate commerce notwithstanding the fact that it had an indirect effect on working conditions within a state. But the *Hammer v. Dagenhart* decision of 1918, which had never been directly overruled, had held that a very similar provision directed solely at child labor was not constitutional. To meet this problem, the federal attorneys urged that the decision in the Dagenhart case had been repudiated in numerous cases and should be disregarded as having no influence on the question then before the Court.

<sup>8</sup> 312 U. S. 100 (1941).

The opinion of the Court was written by Mr. Justice Stone. To his mind, three questions were involved and were to be decided upon. The principal question was whether Congress constitutionally could prohibit the shipment in interstate commerce of goods produced by workers whose wages and hours did not measure up to the standards set by the act. A second question was whether Congress could prohibit the employment of workmen at wages or hours poorer than the standard, if the workmen were producing goods for commerce. A subsidiary question was whether Congress could require employers subject to the act to keep records showing work time and pay of employees.

The Court lost little time in indicating its approval of the legislation. As the justices viewed the problem, the manufacture of goods was not interstate commerce, but the shipment of goods across state lines was. The prohibition of such commerce was to the Court "indubitably a regulation of the Commerce." Pursuing this line of thought, the Court stated that:

"the power of Congress over interstate commerce is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed by the Constitution . . . that power can neither be enlarged nor diminished by the exercise or non-exercise of state power . . . Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals, or welfare, even though the state has not sought to regulate their use."

The latter part of the passage just quoted merits further examination. Congress may follow its own conception of public policy, that is, what is beneficial or harmful to the people, and may prohibit the movement of goods that it thinks injurious, even though the states have not chosen to regulate. This power, as stated by the Court, is closely akin to the police power of the state. At a subsequent point in the opinion reference is made again to Congress following its own conception of public policy. This points up the fact that after 1937 the Court began to permit Congress to use the interstate commerce power as a basis for legislation equivalent to state controls under the police power. In fact, since 1935 Congress has, with subsequent court approval, assumed a considerable amount of federal police power under the commerce clause. Referring to the broadening of the commerce power and to the motives that might underlie legislation based thereon, the Court stated, "Whatever their motives and purposes, regulations of commerce which

do not infringe some constitutional prohibition are within the . . . power conferred on Congress by the commerce clause." In this particular instance the law was to make effective the principle that interstate commerce should not be used as the instrument of competition in the distribution of goods produced under sub-standard conditions.

A further comment on the influence upon the states of commerce regulations is, considering the frequent verbosity and legal terminology of court rulings, clear and pointed. "The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate . . . to the exercise of the granted power of Congress to regulate interstate commerce." With this conclusion, the objection that the law violated the tenth amendment by invading powers reserved to the states could not be entertained.

That conclusion, by implication, also did away with the conception of the interstate commerce power expressed in *Hammer v. Dagenhart*. But the Court did not deal with that case by implication only. Mr. Justice Stone referred to the "powerful and now classic dissent of Mr. Justice Holmes" in that decision. It will be recalled that in that dissent the position was taken that Congress did have the power to prohibit the shipment of goods in interstate commerce and that the effects of such regulations on intrastate matters did not invalidate the power. The majority ruling in the *Hammer* case had not been followed, Mr. Justice Stone pointed out. Then, to make sure that there was no misunderstanding concerning the future status of that case, the Court stated "the conclusion is inescapable that *Hammer v. Dagenhart* was a departure from the principles which have prevailed in the interpretation of the commerce clause both before and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted. It should be and now is overruled."

The contention that the act violated the fifth amendment by taking liberty and property without due process of law was not convincing to the Court. Since the *West Coast Hotel v. Parrish* case of 1937 had validated the regulation of wages, the due process violation of a wage regulation was held to be no longer open to question. And if such control was valid for the state legislatures under the fourteenth amendment, it was equally valid for Congress under the fifth. As for maximum hours of work, that subject had long been held to be one fit for legislative determination.

The third and subsidiary question raised by Mr. Justice Stone also



was answered in the affirmative. Since Congress was given the power to require that goods produced for shipment in interstate commerce must be produced under fair labor standards, it could require the keeping of adequate records. Such records were necessary to show the degree of compliance with the law should the administrators of the law wish to check any company.

Thus, the law was upheld in its entirety as a valid exercise of congressional authority in so far as the wage and hour provisions of the act were concerned. The child labor provisions of the law were not tested nor have they been tested to date. However, in view of the clear and pointed repudiation of the Hammer case and of the fact that the prohibition in wage-hour law is very similar to the first federal child labor law, there can be no question of the validity of that section of the act. Therefore, since 1941, it has been established that both the federal and state governments have the power to set standards for wages, hours, and child labor, as long as the standards are reasonable and apply to the field of control appropriate for action by Congress or the state, as the case may be.

A second Supreme Court ruling of 1941 is of interest in examining the validity of actions taken under the Fair Labor Standards Act.<sup>9</sup> This case was brought before the courts to test the validity of the appointment of industry committees and of the rulings of the administrator based on the recommendation of these committees.<sup>10</sup> Specifically, the contested action was one of the administrator based on the recommendations of the cotton textile industry committee. The general nature of the industry committees has been discussed above and need not be repeated. With the appointment of such a committee and the public hearings held on the recommendations of each one, the question was whether or not the action taken by the administrator in pushing minima toward the forty-cent goal as quickly as possible was a usurpation of legislative powers that were the province of Congress. The N.I.R.A. had been invalidated, in part at least, because of the fact that Congress permitted powers that only it possessed to be exercised by others. In that case, however, the administrators of the Recovery Act were exercising almost unlimited powers with little in the way of controls or restrictions laid down by Congress. In the case of the Fair Labor Standards Act, Congress did delineate the composition and powers of the industry committees and of the administrators acting on their recommendations. Were the actions in question a new instance of delegation running riot or were they reasonable and defensible?

<sup>9</sup> *Opp Cotton Mills, Inc. v. Administrator*, 312 U. S. 126 (1941).

<sup>10</sup> There was an attack on the constitutionality of the act also, but it was disposed of by referring to the decision in the Darby case.

The Opp case was argued before the Court and ruled upon at the same time as the Darby case. The Opp Cotton Mills Company was an Alabama firm; it was aggrieved by an order of the administrator, made pursuant to a recommendation of the appropriate industry committee, to establish a minimum wage of thirty-two and one-half cents per hour. The District Court upheld the order of the administrator, and the case was carried to the Supreme Court for a final ruling.

Mr. Justice Stone wrote the opinion of the Court. In his view, three questions were involved. The first issue was whether the act violated the Constitution. That matter was disposed of by reference to the Darby decision that, as noted above, was delivered on the same day. The second question was whether the wage ordered by the administrator was valid in view of his procedure and that of the industry committee. The third issue was whether the order was invalid because it was unsupported by such substantial evidence as would be necessary if due process of law were observed.

On the matter of whether the administrator and the industry committee were legislating rather than administering, the Court held that:

"the mandate of the Constitution that all legislative powers granted shall be vested in Congress has never been thought to preclude Congress from resorting to the aid of administrative . . . boards as fact-finding agencies whose findings, made in conformity to previously adopted legislative standards or definitions of congressional policy, have been made prerequisite to the operation of its statutory command."

At a later point in the decision a similar but broader and more sweeping approval of congressional delegation of authority appears.

"The Constitution, viewed as a continuous operative charter of government, is not to be interpreted as demanding the impossible or the impracticable. The essentials of the legislative function are the determination of the legislative policy and its formulation as a rule of conduct. These essentials are preserved when Congress specifies the basic conclusions of fact upon . . . which . . . it ordains that its statutory command is to be effective."

With this philosophy of the powers that Congress was capable of delegating, the groundwork was laid for approval of the actions of the administrator and the industry committees. In so doing, the Court examined: the manner of defining an industry, in this case textile; the selection of the industry committee; and the leeway left under the law for administrative determination of facts and policies.

In the opinion of the Court, these matters were within the power of Congress to delegate. Therefore, no basis for invalidity was found in the powers delegated to the administrator.

As to the alleged violation of due process of law required by the fifth amendment, the Court ruled that the public hearings held before the administrator satisfied the requirement of due process. Further discussion of the activities of the administrator all led to the conclusion that they were within the powers that Congress could delegate and that they were reasonably carried out. Therefore, the constitutionality of the act and the validity of the industry committee device for raising wages more rapidly than the law specified were both approved early in 1941, and the time for effective and unhesitating application was at hand. The Darby decision was of continuing importance because the general application of the law continues; the inflation and rising wages of the war and postwar periods largely nullified the minimum-wage provisions, although the maximum-hours provisions retain their importance. On the other hand, since all wage minima reached forty cents per hour by July, 1944, the Opp decision approving the actions taken under the committees has no current importance.

While the law has remained on the statute books, some of its provisions have become out of date. The specified minimum, which was set during a depression, has not been changed during the inflation of the mid-forties and therefore needs revision. Although bills specifying an upward revision in wage rates have been proposed, they have not been enacted. One postwar revision has been made in the law to deal with the great number of "portal to portal" pay suits filed by unions in 1946 and 1947. This modification will be noted subsequently.<sup>11</sup>

#### Application of the act

With the constitutionality of the law established, the interpretation and application of it became important. At least two problems are involved in the application; one question is, to which individual plants within an industry the law should apply, that is, which are the ones that are in interstate commerce or are producing goods for commerce? The second question is, once it is established that a concern is considered to be in commerce or production therefor, what persons in its employ are and are not to be covered? It will be recalled that not all employees in certain plants are necessarily under the act and that coverage for any one employer may be split, with some workers subject to the law and others outside of it. Let

<sup>11</sup> See below, Ch. XXV.

us examine now some of the more important interpretations and administrative rulings under the law.<sup>12</sup>

The first interpretative bulletins issued under the new law blocked out the broad general coverage of the act; this generalized coverage gradually was broken down and stated in more detail. In the first general statement on coverage it was held that workers considered as covered because they were engaged in commerce included, typically but not exclusively, employees in telephone, telegraph, radio, and transportation industries. Also, employees in establishments that are an essential part of the stream of commerce were included with those engaged in commerce. Typical of these were employees of warehouse and storage facilities.

Specification of the workers included under the production of goods for commerce was not so simple. The law applied, typically but not exclusively, to manufacturing, processing, or distributing plants a part of whose products go into commerce. However, it was pointed out that the law was applicable not only to persons actually working on the goods but to those engaged in any process or occupation essential to their production. Thus, maintenance workmen, watchmen, clerks, stenographers, and messengers would be covered because their work was contributory to the final production of the goods. If an employer desired to narrow the coverage of employees in his place of business, he had to assume the responsibility for proving that the workers he sought to exclude were completely divorced from the processes necessary for production of the goods going into commerce.

The act was held not to cover firms whose employees worked on materials derived within the state to yield a product disposed of within the state, even though the product came in competition with goods brought into the state from elsewhere. It further was stipulated that the applicability of the act was not dependent upon the location of the work; employment done at home was covered just as employment in a factory. Finally, the first interpretation specified that whether wage payments were on an hourly, weekly, monthly, or piece-work basis the law was equally applicable as regards hours and wages.

Many other questions of coverage remained to be clarified, however. As to when an employer was producing goods for commerce, it was ruled that he was so engaged when he hoped or had reason to believe that the goods being produced would move in interstate commerce. If, however, a lumber company sells material for the

<sup>12</sup> The basis of the following discussion is found in the interpretative bulletins of the Wage-Hour Administration. Reprinted in Prentice-Hall's *Complete Labor Equipment*, Vol. 1, *Wage and Hour*.

construction of a project within the state and some change in plans or needs stops the project with the result that the lumber is resold outside the state, the producer of the lumber will be deemed as having had no reason to expect such action and will not be subject to the act. On the other hand, the lumber dealer who sold material to a furniture manufacturer within the state knowing or assuming that part of the furniture would be shipped outside of the state would be covered, as would the button manufacturer who sold his product to a clothing manufacturer in the same state but with a national market. Similarly, a producer who does not ship his goods across state lines, but sells them F.O.B. or disposes of them to a same-state jobber or warehouseman, who in turn ships them out of the state, is subject to the act. Also, the production of a good not used in the manufacture of an article but necessary for its movement in commerce is subject to the act. The production of cars, containers, shoe boxes, and the like are cases in point.

Another type of problem similar to those that have been noted above arose out of the practice of subcontracting parts of the production of a good. For example, a clothing manufacturer sends material to a contractor who sews the material and returns it. The contractor is subject to the requirements of the law if he has reason to believe that the articles on which his employees work will find their way into interstate commerce.

A producer who obtains raw materials from outside the state and turns out a good used almost entirely within the state is not subject to the act; thus, a baker who purchases flour from outside the state would not be covered. But the production of goods all of which are used locally is not always outside the coverage of the law. Employees of a tool and die concern whose products were sold locally to a manufacturer whose production in turn went into commerce would be subject to the law. The line becomes a little vague at times in view of the fact that it has been ruled that those employees of a bakery who order raw materials may be covered by the law. This emphasizes the fact that coverage is an individual matter.

Generally, the employees of local builders and contractors are not considered subject to the act. However, workers employed by contractors who repair, reconstruct, or maintain railroads, bridges, highways, or pipelines are subject to the act. Similarly, repairing or reconstructing buildings used in the production of goods for commerce are held subject to the provisions of the law.

While local retailers specifically were exempted under the law, wholesalers have been construed as being in commerce and therefore subject to it. However, in many cases wholesalers may sell some

goods directly to consumers in addition to selling to the trade. In such cases, since coverage is on an individual basis, it is possible for the wholesaler to segregate the workers engaged in the direct sales from those who are regular wholesale employees.

Where workers are engaged in the production of goods for commerce, the act does not specify the proportion of the goods produced which must go into interstate commerce in order for the worker to be covered. In interpreting this problem, the administrators stress the fact that Congress and the President both intended the banning from interstate shipment of all goods produced under substandard conditions. In that view, it becomes unlawful to ship *any* goods on which *any* employee has worked in violation of the provisions. The portion of the employee's time that must have been spent on the production of goods for commerce in order to subject him to the act is not clear. Apparently, there must have been a substantial part of the worker's time spent on goods for commerce before the law applies. A figure of twenty per cent has been suggested as a minimum; however, the federal High Court has set no figure and probably would be unwise to attempt to do so.<sup>13</sup>

The exemption of retail and service establishment employees from the act, if the greater part of their selling is intrastate, required extensive definition of exactly what was considered a retail or service establishment. The gist of the stated opinion of the administrator was that a retail establishment is just about what the public thinks it is, that is, an establishment characterized by many small sales to the consuming public for direct consumption. Many questions of degree may arise, so the picture is far from clear cut. What, for example, is the amount of non-retail sales necessary to change a classification, or the amount of alteration or processing of clothing that will make the clothier a producer rather than a retailer? A service establishment such as a barber shop or laundry clearly is not covered; on the other hand, a linen supply company serving railroads and hotels would be covered.

Commercial banks, a type of service organization, are held to be subject to the law, as are mutual savings banks and savings and loan associations. Similarly, security dealers and automobile-finance concerns have been ruled subject to the law, as have insurance companies. Newspapers have been ruled as covered, unless small and local,<sup>14</sup> but the local sale and distribution of papers has not. There are many other types of service establishment where divisions

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<sup>13</sup> *Prentice-Hall Labor Course.*

<sup>14</sup> Small, local, non-daily newspapers with less than a specified circulation are exempted from coverage by the Fair Labor Standards Act, Sec. 13.

have been made on coverage, but they are so small and unimportant as to make discussion unnecessary at this point.

Some question arose as to whether a collective agreement entered into and providing lower wage rates or a longer basic work week than stipulated in the law could be observed. Such agreements were invalid if less exacting than the law. When the agreement called for more than the law specified, the law did nothing to release the parties from any obligation assumed to each other.

Union-employer agreements could be used in two situations as a means of escaping the hours-per-week provisions of the act. If the agreements are made with *bona fide* representatives of the workers and if they provide for not more than 1000 hours in six months or 2080 hours per year, the requirements of the basic work week can be ignored. Thus, under the 1000-hours provision, workers in isolated areas and during rush periods can work longer hours without penalty rate. Similarly, those who are working under some fixed annual-wage plan can do likewise. In the latter case, however, the guaranteed wage must be 2080 times the regularly paid hourly wage rate. An employer cannot satisfy the requirements of the law by paying 2080 times the minimum rate of forty cents per hour if the specified wage rate for an individual is ninety cents per hour. To satisfy the law, the worker must be assured of an annual wage based on ninety cents per hour.

It should be borne in mind that the exemption is not complete in the above cases. Where workers are employed under the provisions of an agreement specifying the work time over a longer period the company is excused from observing the forty-hour work week. However, employees may not be worked more than twelve hours daily or fifty-six hours weekly without penalty rates being paid. And if the 1000 or 2080 hours of work are exceeded in the set period of time, the exemption from the regular provisions of the law is lost and penalty rates are required to be paid on all over the standard basic work week.

The child labor provisions have been interpreted and applied. The law as stated provided that goods were barred temporarily from interstate shipment if oppressive child labor had been employed in their production. Oppressive child labor included the employment of children under age sixteen in most occupations and between sixteen and eighteen years in industries labeled hazardous by the Children's Bureau. The Chief of the Children's Bureau was empowered to determine the conditions under which children from fourteen to sixteen years of age could be employed without such employment being deemed oppressive. The law forbade the employment of children of this age group in mining and manufacturing establishments.

An employer satisfies the law if he has in his possession a certificate stating that any employed minor is of employable age. These certificates can be issued by a representative of the Children's Bureau or by an approved state labor agency. The specific evidence on which age may be certified need not be reviewed here; in general, some substantial proof of age is required, and children from fourteen to sixteen years may be certified to work only for limited periods in certain industries. These industries may not include the following: manufacturing or mining, hoisting apparatus and power-driven machinery, operation of motor vehicles, and messenger service. Hazardous occupations also are excluded, since they are prohibited to all under age eighteen. For children from fourteen to sixteen years of age, employment must be outside of school hours, between 7:00 A.M. and 7:00 P.M., and not in excess of three hours on a school day, eight hours on other days, or eighteen hours in a school week. At times when school is not in session a youth of fourteen to sixteen years may be certified for employment up to forty hours per week.

In determining industries that are hazardous and therefore are closed to the employment of children under eighteen years, an investigation is made by the Children's Bureau. This is followed by a public hearing on the proposed order of the Bureau. Unless proof is advanced that amendment of the order is needed, it then becomes effective. The following list of industries has been designated as having all or most of the occupations therein of a hazardous nature: explosives, coal mining, operation of motor vehicles, lumber and sawmills, radioactive substances, and operation of power-driven hoisting apparatus.<sup>15</sup>

Payment of the required minimum wage may not be made in scrip, tokens, credit cards, or any other medium that is neither money nor something readily converted at face value into money. Likewise, any kind of kickback of wages by an employee is forbidden. However, employers may make certain deductions from the pay of their workers without violating the law. Obviously, taxes, group insurance premiums, and union dues may be deducted. In addition, the employer may deduct from wages the reasonable cost of facilities customarily provided the employee, such as housing, meals, fuel, or goods provided on credit at the company store. So long as no more than the reasonable cost of these facilities is deducted, the final payment to a workman may be less than the legal minimum without violating the law.

A further exemption from the maximum-hours provisions of the law excludes persons covered by the Motor Carrier Act of 1933. In

<sup>15</sup> *Prentice-Hall Labor Course.*



essence, this removed from the regulation of the Fair Labor Standards Act all operators, mechanics, loaders, and helpers of common, contract, and private motor carriers and of pick-up and delivery concerns. However, the transportation within a state of goods to be used to facilitate interstate commerce, as food or ice to service a train, or in the production of goods for commerce still comes under the jurisdiction of the act. Other previously noted exemptions, such as agricultural workers, seamen, and fishery workers, although carefully defined in interpretations of the act, do not vary sufficiently from commonly assumed definitions to warrant discussion in this brief survey.

Since the determination of what constituted hours worked became so important after the war, the interpretation of the administrator is worth noting here. This will serve as a basis for a subsequent examination of the "portal to portal" pay suits of 1946 and 1947. Work time was construed by the administrator to mean, in general, all the time that a worker was required to be on duty under the employer's directions or all the time that he was permitted to work, whether required to do so or not. In essence, this meant time from the beginning to the end of the work day with the exception of meal periods. However, many questions arose as to how this principle should be applied in specific cases.

For example, questions arose as with respect to time spent waiting for work at the requirement of the employer. Such a case would occur when a breakdown stopped work but when the probability of early repair caused the employer or one of his supervisors to direct that the workers stand by to resume work. Although the employee may not have been at work, his time was not his own and he was under the direction of the employer. Similarly, a messenger or chauffeur, although not performing services constantly, is available for work and cannot spend his non-working time as he pleases, so all time on duty counts as work time. In some cases a person could be on call for work but allowed to spend his time away from the work premises if he could be found at any time. In such cases the time on call but not actually called for duty would not be construed as work time.

An equally complicated situation arises out of travel time and time spent in preparation for work. If it is necessary to travel for an appreciable amount of time in order to perform the duties that are assigned an individual, then the travel time should be construed as work time. Although this fact was recognized in early interpretations, no figure was set on the amount of time per day that would be sufficient to be classed as "unreasonably disproportionate" and therefore considered a part of the work day. Although it was not men-

tioned in these early instances, the same type of problem was present in the matters of the amount of time required for baths or changing clothes when jobs were such as to make these necessary. In both instances, travel and preparation, the basic problem was to determine when an amount of time ceased being a trifle and became substantial. Since the law avowedly does not concern itself with trifles, a substantial amount of time had to be involved in order for it to be counted in with work time.

The exclusion of learners, apprentices, and handicapped workers from the minimum-wage provisions of the act requires careful definitions of such categories and rules as to the permissible extent of the exceptions. An apprentice is a person at least sixteen years of age covered by a written apprenticeship agreement approved by an appropriate federal or state apprenticeship organization. Such agreement is required to provide for not less than 4000 hours of reasonably continuous employment, participation in an approved schedule of work experience, and at least 144 hours per year of supplementary instruction. Rules for the application for and issuance of certificates authorizing the employment of apprentices are carefully worked out, following roughly the requirements sketched in this paragraph.

Learners present somewhat the same problem as apprentices, and permission to hire at a rate below the minimum can be obtained only by securing certificates for such employment. The difference between a learner and an apprentice is one of degree; both are learning how to do a skilled job, but in the case of a learner the training period is much shorter than for the apprentice. No learners' certificates are to be issued unless it is shown that a sufficient number of experienced workers are not available and that employment opportunities for learners would be curtailed without the special permits.

Handicapped workers also can be hired by special permit at less than the legal minimum. Their case differs from those of apprentices and learners primarily in the permanence of the inability to earn the minimum wage. When apprentices or learners acquire certain requisite skills, they move out of their special category; a man who has lost a hand or his sight is handicapped for life on many or perhaps all jobs. Although with careful placement many handicaps can largely be by-passed, this is not always the case; thus the special wage-rate provisions for the handicapped. These are not to be invoked under the following conditions: for temporary disabilities; for those who are slow and inexperienced; for reasons of age alone (except in very unusual circumstances); or for piece-rate earnings low owing to the rates set. Under other conditions,

however, certificates for employment at sub-minimum rates can be granted.

The interpretation and application of the enforcement provisions of the act merit some additional attention. The act provides fines up to \$10,000 and imprisonment up to six months or both for those who wilfully violate any of its provisions. The word "wilfully" may be interpreted in a number of different ways; essentially, it seems to have been interpreted to mean violation with a knowledge of so doing. Imprisonment is not to be imposed for the first conviction under the act. However, an employer who fails to pay his fine for a first offense can be imprisoned. On the other hand, the law gives no power for confiscation of goods produced under sub-standard conditions.<sup>16</sup>

With regard to employees' wage suits, both the federal district courts and state courts have jurisdiction. The former derive such authority from the Judicial Code that provides district courts with jurisdiction over all suits, regardless of the amount of money involved, if they arise out of laws regulating commerce. Since the Supreme Court has received cases that come to it from state courts, its jurisdiction also is assured.<sup>17</sup>

As to injunctions against the shipment of goods produced in violation of the act, such action can be taken whether the violations are wilful or not. Contrary to most injunction proceedings, it is not necessary to show the threat of irreparable damage to property in order that the injunctive unit be issued. Nor is jury trial provided in such cases. The principles followed in the endorsement of legislation by injunction are somewhat different from those that apply in ordinary equitable relief.

Such, in brief, are the provisions of the Fair Labor Standards Act and the administrative and judicial interpretations of these provisions issued. Although the law was a long step forward when it was enacted, it has suffered, as does most economic legislation, from inflexibility. Until 1948 there have been no changes in the minimum-wage, maximum-hour, and child labor provisions of the law since it was passed. Forty cents per hour for a forty-hour week did not provide an adequate wage for families even in the 1930's when the law was enacted. But since that time, costs of living have risen markedly. While the shortage of labor and the economic action of unions have forced wage rates up in most areas and occupations, there still are millions of workers whose wages need support by a legally fixed minimum and at a rate of more than forty cents per hour. The

<sup>16</sup> *Prentice-Hall Labor Course.*

<sup>17</sup> *Ibid.*

inflexibility of legislation once it has been enacted is one of the most valid criticisms that can be made of economic controls.

### Questions

1. Do substandard wages and working conditions have as clear a relationship to interstate commerce as was imputed in the statement of policy of the Fair Labor Standards Act?
2. During World War II many persons bemoaned the Fair Labor Standards Act, saying it set a forty-hour work week when longer hours were needed. To what extent did the act restrict work time?
3. How far can federal controls over wages and hours be extended under the interstate commerce power?
4. What were the functions of the industry committees? How were they appointed and what was their composition?
5. Which Supreme Court ruling, *Hammer v. Dagenhart* or *U. S. v. Darby Lumber Co.*, shows the more defensible interpretation of constitutional provisions?
6. The Fair Labor Standards Act sets basic hours. How is work time defined? What time, if any, other than the time actually spent at the place of work can definitely be called work time?

## CHAPTER XV

### CONTROL OF THE LABOR INJUNCTION

#### Injunctive abuses prior to 1932

This chapter and the two following will trace government policies toward the right to organize up to the second World War. They will deal with both the negative policies, such as those that discourage or eliminate obstructions to organization, and the more positive ones that extend an outright guarantee of the right of workers to join unions of their own choice. The first subject for examination is the attempt by the federal government to control the use of labor injunctions.

It will be remembered that early in the twentieth century organized labor had engaged in a concerted campaign for legislative restriction of the use of labor injunctions. At first they believed that they had gained the desired relief in the Clayton Act. However, ten or fifteen years of application of the law led them to at least three disillusioning conclusions. These were: first, the act did little or nothing to remove or limit the use of the injunction in labor disputes; second, it made it possible for individuals as well as the government to secure injunctions against violations of the anti-trust laws; third, out of rulings on the act, especially the Duplex Case, came a restrictive definition of a labor dispute.<sup>1</sup> Under this concept, members of a union that had a grievance against an employer were not parties to the dispute unless they were employees of the employer involved in the disagreement. This definition was dealt with in the Norris-LaGuardia Act.

By the time of the Bedford Cut Stone decision in 1927 trade unions had a thousand examples of the manner in which the injunction could be used against them and hundreds that proved the ineffectiveness of the Clayton Act. Almost all usage of the injunction was against labor, moreover; a few orders had been issued at the request of labor, but these were rare and some of those so issued were to restrict actions of a rival union rather than those of an employer.<sup>2</sup> But it was not only the quantity and preponderant bias of the injunc-

<sup>1</sup> The Duplex case and others referred to here were reviewed previously in Ch. VI.

<sup>2</sup> For a summary of injunctions issued on behalf of unions see: Frankfurter, F., and Greene, N., *op. cit.*, pp. 108-112.

tions issued that sparked the new drive by organized labor for relief from injunctions. All of the abuses previously noted were still present: the blanket coverage of all persons whomsoever, the punishment of violators by contempt, the lengthy legal proceedings that were involved in appeals, the enjoining of activities whose legality was clear, and the weakening of union morale by the issuance of such orders. All of these abuses helped to build a union attitude that something must be done to take from employers the ready access to court orders that could be used to combat labor more effectively.

Although labor was faced with injunctions issued by both state and federal courts the greater number of which originated with the states, it was advisable to move for controls over injunctions by federal courts first because the higher courts were likely to be drawn into the more important cases; in addition, federal laws would serve as a pattern for future state legislation. The move for legislative restriction of the power of the courts to issue injunctions began under a cloud of doubt, owing to a 1921 Supreme Court decision in an Arizona anti-injunction statute.

#### Early state regulation of injunctions

The Revised Statutes of Arizona, 1913, contained a passage which provided, in part, that:

"No restraining order or injunction shall be granted by any court of this state, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving or growing out of a dispute covering terms or conditions of employment, unless necessary to prevent irreparable injury to property or to a property right . . . and no such restraining order or injunction shall prohibit any person or persons from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do."

A court case testing the validity of this provision was begun in April, 1916. The dispute concerned the peaceful picketing of a restaurant in Bisbee by striking cooks and waiters. The picketing proved effective, with business receipts falling sharply; consequently, the owner of the restaurant asked an injunction to stop the picketing. The plaintiff maintained that the law quoted was in violation of the fourteenth amendment of the Constitution, in that he was deprived of property without due process of law and denied equal protection of the laws. The union maintained that there was no proof that irreparable damage to property was being threatened.

When the case was heard, the county court upheld the law, dismissing the complaint; on appeal, the Arizona Supreme Court upheld the decision. An appeal was carried to the federal Supreme Court.

When the case was heard,<sup>3</sup> the federal Court reversed the rulings of the state courts. As the Court viewed the problem, "Plaintiff's business is a property right . . . and free access for employees, owner, and customers to his place of business is incident to such right." After some review of the complaint of the owner, the majority voiced the opinion that "a law which operates to make lawful such a wrong as is described in plaintiff's complaint deprives the owner of the business and the premises of his property without due process, and cannot be held valid under the Fourteenth Amendment." Not only was property taken, but it was decided also that "the plaintiffs have been deprived of the equal protections of the law."

Mr. Justice Holmes and Mr. Justice Brandeis wrote dissenting opinions that took sharp issue with the majority decision. The former Justice was, as usual, brief and sharp. He quarreled with the concept that the right to do business was property and that the rights of ownership could not be substantially curtailed if need be. His most cogent point of dissent, however, was one which was made in other opinions. In his language, "There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires."

Mr. Justice Brandeis went to greater lengths to dissent; his opinion was concurred in by Justices Holmes and Pitney. As usual, the Brandeis dissent was a dissertation on the law as it related to social and economic problems. To Justice Brandeis, "This right to carry on business—be it called liberty or property—has value . . . but for cause the right may be interfered with and even be destroyed. . . . Practically every change in the law governing the relation of employer and employee must abridge, in some respect, the liberty or property of one of the parties." The validity of this point of view cannot be denied; the entire history of legislation is a history of state restriction of the manner in which individuals can pursue what they believe to be their own best interests. With most regulations that are reasonably drawn and applied, there would be little hardship involved. But the minority who may wish to ignore legal limitations may feel that the law deprives them of liberty. Even so, the deprivation is not a violation of the Constitution if liberty or property is taken with due process of law. Since "due process" can never be pinned down completely, there is ample opportunity for pleas

<sup>3</sup> *Truax v. Corrigan*, 257 U. S. 312 (1921).

that certain measures violate the fourteenth amendment by taking property without due process.

Another point of Mr. Justice Brandeis' dissent is worth noting. Concerning the right of states to restrict the authority of their courts to grant injunctions, he said:

"States are free since the adoption of the Fourteenth Amendment as they were before, either to expand or contract their equity jurisdiction. The denial of the more adequate equitable remedy for private wrongs is in essence an exercise of the police power, by which, in the interest of the public and in order to preserve the liberty and the property of the great majority of the citizens of a State, rights of property and the liberty of the individual must be remoulded, from time to time, to meet the changing needs of society."

To the social scientist, the concept that the law should be a changing body of principles directed at all times at protecting the needs of society is basic to a sound system of government controls in economic relationships. In a dynamic economy the powers of various groups and their ability to protect their own interests change markedly from time to time. Under such conditions, the regulatory framework in which economic action takes place must change. Any attempt to impute to legislative controls a timeless ability to fit all situations is unwise and is not founded on "the economic facts of life."

In view of the *Truax* decision, there was some doubt about the feasibility of anti-injunction legislation. However, the later 1920's showed some signs of a change in attitude. The New York Court of Appeals refused in two cases carried up to it to sanction labor injunctions. In 1928 both major political parties endorsed anti-injunction legislation; in 1930 the Supreme Court rendered a decision on the Railway Labor Act of 1926 showing a change in its previous attitude toward labor unionism.<sup>4</sup> Although it was not certain that anti-injunction legislation would be approved, the prospect looked brighter and such laws were urged in various states and in Congress. The move in Congress bore fruit in March, 1932, when both houses passed by large majorities the federal anti-injunction law.<sup>5</sup>

#### Provisions of the Norris-LaGuardia Act

The Norris-LaGuardia Act is of importance for two reasons. One is the relief it has afforded labor from the abusive use of the injunc-

<sup>4</sup> *Texas and New Orleans Railroad v. Brotherhood of Railroad Clerks*, 281 U. S. 548 (1930). See also: Segal, M. J., *The Norris-LaGuardia Act and the Courts*, pp. 5-6. Washington, D. C.: American Council on Public Affairs, 1942.

<sup>5</sup> 47 Stat. 70, 1932.



tion. The act is also significant for its statement of public policy. Prior to its enactment it had not been common practice to precede legislation by such a statement. In this case it presumably was done to justify the provisions of the law when they came before the Supreme Court.<sup>6</sup> The statement is of great importance because it specifically attests the public policy of the nation to be that workers have the right to organize in unions of their own choosing if they so desire. Here was stated for the first time a recognition of the fact that for many years the sympathies of legislatures and the courts had tended to be in favor of the owners of property. The doctrine, so evident since the framing of the Constitution, that the ownership of property gave a right to expect more privileges from the government than were extended to the propertyless took a backward step in the statement that preceded the body of the Norris-LaGuardia Act.

Except for railroad workers, this was the first time in the nation's history that a flat statement was made signifying the sanction by the government of the right of self-organization. The statement of policy provided in part:

"Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, . . . though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from interference, restraint, or coercion . . . in the designation of such representatives or in self-organization. . . ."

Since it was clear that injunctions had been used in numerous instances in the past to restrict the actions of organized labor or the organization of the unorganized, it was logical for the Congress to move from the public policy statement to the establishment of controls over the issuance of injunctions by the federal courts. This the Congress proceeded to do; any such controls of state courts had to be imposed by state legislatures. Congress did not forbid the issuance of injunctions in labor disputes, but it did, much as in the Clayton Act, state good injunctive practice and policy to be followed by the federal courts when injunctive relief was sought in the course of a

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<sup>6</sup> *Prentice-Hall Labor Course.*

labor dispute. One difference between the Clayton Act and the Norris Act was that the latter was the more carefully written, with little opportunity for varied interpretations. The wording used also showed that the framers of the law were aware of the problems and abuses that had been associated with the labor injunction.

Although the terminology was not used, the yellow-dog contract was declared to be contrary to public policy and was made unenforceable in any court of the United States; it was not to be used as a basis for injunctions. This part of the law was to prevent a recurrence of such cases as the *Hitchman* decision. To guarantee that the prohibition was clear in every way the law defined the unenforceable anti-union contracts as "Every undertaking or promise hereafter made, whether written or oral, express or implied, . . . whereby (a) either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization."

With the yellow-dog contract disposed of in this manner, a number of actions were listed against which the federal courts were forbidden to issue injunctions. As the law read, the courts could not:

"prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following, . . .

- a. Ceasing or refusing to perform any work or to remain in any relation of employment;
- b. Becoming or remaining a member of any labor organization or of any employee organization . . . ;
- c. Paying or giving to, or withholding . . . ; any strike or unemployment benefits or insurance or other moneys or things of value;
- d. By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;
- e. Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
- f. Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;
- g. Advising or notifying any person of an intention to do any of the acts heretofore specified;
- h. Agreeing with other persons to do or not to do any of the acts heretofore specified; and
- i. Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act." [the section which declared yellow-dog contracts to be contrary to public policy.]

Essentially, these prohibitions denied to federal courts the right to forbid striking, peaceful picketing, and giving or paying strike benefits or other funds in case of a strike. Nor could a court hold that persons doing in concert any of the acts listed above were guilty of an unlawful combination or conspiracy. The provision that the courts were not to prohibit the actions whether taken singly or in concert was an attempt to put an end to the time honored doctrine of conspiracy that found its way into so many labor decisions even in the twentieth century. Further, no officer or member of an organization nor the organization itself should be held responsible or liable for unlawful acts of individual officers, members, or agents except on clear proof of actual participation in or authorization or ratification of the action after a clear knowledge thereof. Need for this provision was found, in part at least, in the situation that developed in the *Loewe v. Lawlor* case. In that decision the Supreme Court held individual members of the Hatters' local union financially liable for damages resulting from a secondary boycott. Yet many of the union members insisted that they took no part in the actions for which they were held liable.

Whatever the real situation in the *Loewe* case, it is true that much union action is not the result of unanimous union authorization. There is, however, a real and serious question as to how far union members can be expected to be responsible for the action taken by leaders and how far leaders can be expected to be responsible for unauthorized action of the rank and file. It seems clear that a greater degree of responsibility for actions of any group within a union must be expected, now that unions have grown so much larger and more powerful. This is not intended to imply that unions try to escape responsibility; it is rather to suggest that both officers and members must assume some responsibility for actions taken by the union because unions must be responsible economic organizations if they are to continue.

Notwithstanding the limitations on the issuance of injunctions, there were certain instances under which federal courts might grant them. Temporary or permanent injunctions in a case growing out of a labor dispute could be issued only after a hearing of which notice had been given to the interested party. At this open hearing it was necessary that the court be convinced that one or more of the following conditions existed: (a) that unlawful acts had been or would be committed unless restrained, in which case injunctions might be issued only against the persons actually making the threat, committing the act, or ratifying the act with actual knowledge of it; (b) that substantial and irreparable injury to complainant's property would result without the aid of injunction; (c) that the complainant

would suffer greater loss without the relief than would the defendant if the order was granted; (d) that the complainant had no adequate remedy at law; and (e) that public officials were unable or unwilling to provide adequate protection.

Despite such restrictions established on the issuance of temporary or permanent injunctions, temporary restraining orders might still be issued without a hearing of both parties if the complainant could convince the judge by testimony given under oath that failure to issue the order would result in substantial irreparable injury. The temporary orders could remain valid only five days, and for that long only if the complainant provided bond to reimburse the defendant, in case it developed that the order was improperly issued, for the losses sustained.

Another restriction required that injunctions be issued only when the complainant came into court with clean hands. He must have complied with the law and made "every reasonable effort to settle the dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration." If an injunction was issued it could prohibit only the specific acts complained of by the petitioner.

In cases arising under the act in which a person was cited for contempt of court he was entitled to trial by jury unless the contempt was in the presence of the court "or so near thereto as to interfere directly with the administration of justice." In the case of a non-jury trial, the defendant accused of contempt might demand the withdrawal of the judge sitting in the proceeding. On such demand, the judge was obliged to retire and another was named to hear the case in question.

To close the act the term "labor dispute" was defined. It will be seen that the definition was very broad, the purpose being to remove the possibility of decisions such as in the Duplex case, in which it was ruled that there was no labor dispute because the parties did not stand in the relationship of employer and employee. With the definition in the Norris-LaGuardia Act such a ruling could not occur. A case was said to grow out of a labor dispute:

"when the case involves persons who are engaged in the same industry, trade, craft or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees."

Further:

"The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation

of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

This definition was a necessary one in view of the very nature of unionism. One of the advantages of unionism is that in cases especially difficult to settle aggrieved employees can have their bargaining done by some persons or organization over which the employer has no job control. To deny the existence of a labor dispute unless the disputants are employer and employee would strike at the very basis of unionism.

Such were the provisions of the federal anti-injunction act. The nature and wording of much of the act sprang directly from abuses that had manifested themselves in equity proceedings during a third of a century. Comparison with everyday injunctive practice emphasized marked new departures. The act was a carefully drawn attempt to restore the injunction to its proper place as a means of protection from irreparable damage to property rather than as a weapon frequently used against organized labor.

#### Court interpretation of the Norris-LaGuardia Act

Despite the wording of the act, its early interpretation by the courts was confused, and sharply conflicting rulings were handed down by various courts; many judges in the lower federal courts virtually ignored the act and continued as before. It still was easy to decide that irreparable injury was threatened, or that no labor dispute, as defined by the act, existed.<sup>7</sup> On the other hand, some judges denied petitions for injunctions on the basis that the new act forbade their issuance under the circumstances presented in the case. As was usually true, a ruling of the Supreme Court was needed to clarify the validity and meaning of the act.

Prior to the Supreme Court's determinations of the constitutionality of the Norris Act, it reviewed a case contesting the validity of a Wisconsin anti-injunction law.<sup>8</sup> This ruling is of interest and importance because it indicated the probable Court opinion on the federal law. The case arose out of the attempt of the Tile Layers Union to compel Senn, a small tile-laying contractor, to sign a union agreement. Since he hired very few persons, Senn did much of the

<sup>7</sup> Segal, M. J., *op. cit.*, pp. 9-15, gives an excellent summary of the decisions of the lower courts from the time that the act was passed until its constitutionality was established by the Supreme Court in *Lauf v. E. G. Shinner & Co., Inc.*, 303 U. S. 323 (1938).

<sup>8</sup> *Senn v. Tile Layers*, 301 U. S. 468 (1937).

tile laying himself; he offered to sign an agreement with the union covering his workers if the union would omit from the contract a clause that prohibited contractors from doing any of the manual labor. The time of the dispute being the early thirties when work was very scarce, the union refused to omit the prohibiting clause. Senn refused to sign and the union set up a picket line at his place of business. He asked injunctive relief, which was denied by the Circuit and Supreme Courts of Wisconsin on the grounds that the State Labor Code, containing provisions similar to the Norris Act, allowed peaceful picketing in labor disputes such as the one in question.

By a five-to-four decision the Supreme Court upheld the Wisconsin courts' denial of injunctive relief. Mr. Justice Brandeis, who had dissented in the *Truax* case some years before, wrote the majority opinion. While it was held that the *Truax* case did not apply, in view of the more violent and abusive action taken by the pickets in that case, much the same reasoning was followed. The question before the Court was whether the Wisconsin law violated the due process and equal protection clauses of the fourteenth amendment. According to Mr. Justice Brandeis, the peaceful picketing allowed by the Wisconsin law was clearly in keeping with the federal Constitution; in addition, the end sought by the unions was not unconstitutional. As for the publicity given by the picketing to the allegation that Senn was unfair to organized labor, the majority held that such action was no more unfair than the competitive advertising of businessmen. Thus, the law was valid, the state courts upheld.

The dissenting opinion of Mr. Justice Butler was more of a denial of conclusions than a difference in reasoning. The dissenters held flatly to the contention that the object of the union was unlawful, a direct contradiction of the majority ruling. Secondly, they held that the picketing was unlawful because "the signs used constitute a misrepresentation of the facts," again a contradiction of the majority.

The federal anti-injunction act was ruled upon by the Supreme Court in 1938, six years after its passage. The ruling on the case at issue, *Lauf v. E. G. Shinner & Co., Inc.*,<sup>9</sup> established the validity of the act in one brief comment: "There can be no question of the powers of Congress . . . to define and limit the jurisdiction of the inferior courts of the United States." With that question disposed of, the problem was the interpretation and application of the act, that is, whether the facts of the case warranted the injunction issued by the District Court and upheld by the Circuit Court of Appeals, in

<sup>9</sup> 303 U. S. 323 (1938).

view of the restrictions on the issuance of injunctions written into the Norris-LaGuardia Act. The case grew out of the picketing of five meat markets in Milwaukee in an attempt to force the workers in the shops to join a union. The employer told his workers they were free to join if they so desired, and they refused. The picketing continued and the employer asked for and was granted an injunction maintaining that the signs of the pickets were false and misleading. The District Court held there was no labor dispute as defined by the federal law and issued the injunction, which was supported on appeal by the Circuit Court.

The majority ruling in the *Lauf* case was delivered by Mr. Justice Roberts. In ruling on the applicability of the Norris Act to the case before the Court, the broad definition of a labor dispute written into the law was of significance. The District Court had ruled, with the subsequent support of the Circuit Court of Appeals, that there was no labor dispute, in that the picketing was an attempt of a union to bring pressure on the employees of the Shinner Company by coercing the company to direct them to join the union. But, in view of the fact that the law defined labor disputes to include "any controversy concerning . . . representation . . . regardless of whether or not the disputants stand in the proximate relation of employer and employee," the Supreme Court held that the lower court erred in ruling that there was no labor dispute. Since the ruling that no labor dispute existed was in error, the injunction based on that ruling also was in error. The District Court also erred "in granting an injunction in the absence of findings which the Norris-LaGuardia Act makes prerequisites to the exercise of jurisdiction," namely: the threat of irreparable damage and the absence of adequate remedy at law for unlawful acts that have been threatened. Thus, the ruling of the lower courts was reversed.<sup>10</sup>

Very shortly after the *Lauf v. Shinner* ruling the Supreme Court passed on a second case arising under the Norris Act. This decision established more clearly the fact that the Norris Act offered a very real measure of protection against the use of the injunction in labor disputes. The case of *New Negro Alliance v. Sanitary Grocery Co., Inc.*,<sup>11</sup> grew out of the attempt of the New Negro Alliance to force

<sup>10</sup> Mr. Justice Butler dissented again in this case. His opinion was, in essence, an approval of the ruling of the lower courts. He held that there was no dispute between employer and employees and that if the employer acceded to the union's demands to compel the workers to join the union it would be interfering with their liberty. In addition, the company's business being a property right, the free access of customers to the property was necessary for that property right to be used effectively. Therefore, Mr. Justice Butler thought the company was entitled to equitable relief.

<sup>11</sup> 303 U. S. 552 (1938).

the Sanitary Grocery Company of the District of Columbia to employ Negroes in their stores in the areas of the city in which the colored population was concentrated. When the request for the employment of Negroes was refused, one peaceful picket was placed in front of one of the stores with a placard reading, "Do your Part! Buy Where You Can Work! No Negroes Employed Here!" The statements on the placard were true; the patrolling was orderly and not coercive on any person. However, the company sought equitable relief.

On request by the grocery company, an injunction was issued that later was affirmed by the Circuit Court of Appeals. The trial judge believed the Norris Act did not apply in the case; the Court of Appeals affirmed the ruling since it did not involve terms and conditions of employment such as wages or hours. But the Supreme Court had a different opinion; the view of the lower court was "erroneous." The High Court pointed out the fact that the act when defining labor disputes did so in very broad terms, including instances in which the disputants did not stand in an employer-employee relationship. In the Court's words, the definition of a labor dispute was such as to embrace plainly "the controversy which gave rise to the . . . suit and classify it as one arising out of a . . . labor dispute."

Because the Norris Act did not concern itself with the background of a labor dispute the issue was not examined in detail. It was commented, however, that the desire for removal of discriminations on the basis of race or religion was sometimes as important to the disputants as fairness in other terms of employment. Since such discrimination was a part of the terms and conditions of employment the Norris Act applied and the District Court was held in error.<sup>12</sup>

### Labor and the anti-trust laws after 1932

Although the rulings noted above established the validity of the Norris Act and its broad application, the atmosphere was not entirely clarified. Many judges in the lower courts followed the rulings, but some labor injunctions continued to appear. The intent of the act was not to stop completely the granting of equitable relief in labor disputes, but it was designed to restrict it sharply. Other decisions on state or federal laws were needed to indicate the applicability of the act in other types of cases. One interesting and important question that needed answering was the effect of the Norris Act on the application of the anti-trust laws to organized

<sup>12</sup> Justices McReynolds and Butler again dissented, denying that a labor dispute existed.



labor. This issue was ruled upon in 1940 in the case of *Milk Wagon Drivers Union Local No. 753 v. Lake Valley Farm Products, Inc.*<sup>13</sup>

During the depression years a system of milk distribution grew up around Chicago whereby cash-and-carry retail vendors sold the product at lower prices than those charged for the milk regularly delivered to the door by wagon drivers. Vendors and employees formed a local union affiliated with the C.I.O.; the vendors' places of business were picketed by the union of the regular milk route drivers. Since milk came into the Chicago area from outside the state, a question of action affecting interstate commerce was involved. Also, there was a subsidiary question as to whether a labor dispute existed, since the issue was between two unions.

When the vendors sought an injunction against the picketing, it was denied on the grounds that a labor dispute, as defined by the Norris Act, did exist and that injunctive relief was forbidden by the law. The Circuit Court of Appeals reversed the lower court and the case was appealed to the Supreme Court. The question of whether a labor dispute existed was promptly disposed of—the broad definition of a labor dispute contained in the Norris Act covered this action. Mr. Justice Black went on to point out that the clear intent of Congress in passing the Norris Act was to restrict the widespread and indiscriminate issuance of injunctions under the anti-trust laws. Thus, in the Court's opinion, "For us to hold, in the face of this legislation, that the federal courts have jurisdiction to grant injunctions in cases growing out of labor disputes, merely because alleged violations of the Sherman Act are involved, would run counter to the plain mandate of the Act and would reverse the declared purpose of Congress." The Circuit Court ruling was reversed.

A further question of the interrelationship between the anti-trust laws and the Norris Act was ruled upon later in 1940. The problem at issue in the *United States v. Hutcheson*<sup>14</sup> was the enjoynability of picketing in a jurisdictional dispute. There was a dispute between the carpenters' and machinists' unions, both affiliated at that time with the A. F. of L., as to whose members should erect and dismantle certain machinery in and around an Anheuser-Busch and a neighboring brewery. The carpenters picketed the brewery and, through circular letters and their official publication, advised union members and their friends not to buy the Anheuser-Busch beer. The circumstances are remindful of those in the *Gompers v. Bucks* case thirty years earlier. Although the issuance of an injunction was

<sup>13</sup> 311 U. S. 91 (1940).

<sup>14</sup> 312 U. S. 219 (1940)

not a question at the time, the matter of the effect of the Norris Act on what constitutes a criminal violation of the Sherman Law was involved. The Court ruling was that the original anti-trust law had been modified in its application to labor by both the Clayton and Norris Acts. In the Court's words, "Whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and Section 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct."

Perhaps because of the general objection to jurisdictional disputes, the Court recorded its inability to pass on the appropriateness of the specific action. "So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit . . . are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness and wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means." And again the Court went back to the very important section of the Norris Act defining a labor dispute. In the opinion of the majority, this was a dispute under the terms of the act; since the anti-trust laws were no longer separable, in labor disputes, from the Norris Act and since judgments of the desirability of union actions were not to enter, the Court concluded that the acts of the carpenters' union were within the law.

During the same year in which the Hutcheson and Lake Valley decisions were rendered still another ruling was made by the High Court on the use of injunctions in labor disputes.<sup>15</sup> Again, Local No. 753 of the Milk Wagon Drivers Union was involved. It was enjoined from picketing, under about the same circumstances as the Lake Valley case, by the state court. The state Supreme Court sanctioned a permanent injunction against picketing.<sup>16</sup> The case was appealed to the federal Supreme Court, which upheld the state court. The basic reason for this opinion, which conflicted so sharply with other decisions of about the same time, was that violence was prevalent and was inextricably tied up with the actions of the union.

Two challenging dissents to the opinion were written. The opinion of Mr. Justice Black is difficult to compare with the majority because he denied flatly that violence was involved, and the presence of violence was basic to the sanction by the majority of the ruling of the Illinois court. Elsewhere in the dissent of Justice

<sup>15</sup> *Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, Inc.*, 312 U. S. 287 (1940).

<sup>16</sup> *The Meadowmoor Dairies, Inc. v. The Milk Wagon Drivers Union*, 371 Ill. 377 (1939). This injunction was sanctioned despite a state anti-injunction act; the court held that the issues involved did not constitute a labor dispute as defined in the act.

Black and in the separate dissent of Justice Reed it was urged that the injunction issued forbade the exercise of constitutionally guaranteed rights and peaceful assembly.<sup>17</sup> Justice Reed's final comment is worthy of note. "Free speech may be absolutely prohibited only under the most pressing national emergencies. Those emergencies must be of the kind that justify the suspension of the writ of habeas corpus or the suppression of the right of trial by jury. Nothing approaching this situation exists. . . ." <sup>18</sup>

### The effects of the Norris-LaGuardia Act

Enough has been said of the decisions on anti-injunction legislation to show essentially what the courts would approve and condemn under the law.<sup>19</sup> The Norris Act, contrary to the experience under the Clayton Act, has been of genuine benefit to organized labor. Although it is still possible for federal courts to issue injunctions in labor disputes the number has decreased. However, as Millis and Montgomery have so aptly observed, many phrases in the federal law, such as "violence" or "irreparable damage" or "making every reasonable effort" to settle a dispute "are not so definite as one who is not well versed in the law might suppose."<sup>20</sup> And the question of when picketing was and was not peaceful was especially perplexing; in fact, some persons looked with doubt upon the doctrine that any picketing could be peaceful and non-intimidating. Probably a majority of the federal Supreme Court would no longer subscribe to that view; it seems certain that without a change in the composition or attitude of the Court of the late 1940's, that it will not sanction injunctions against peaceful picketing. In 1948, for those who opposed the use of injunctions in labor disputes the future seemed relatively bright, although the resort to an injunction by the federal government in the coal dispute late in 1946<sup>21</sup> and the provisions of the Taft-Hartley Act dampened the optimism.

Not only is the Norris-LaGuardia Act of importance for its influence on federal court equity practice, but it is important for the

<sup>17</sup> Interesting enough for a brief note is the fact that in 1940 the federal High Court reversed the Illinois Supreme Court's approval of an injunction against peaceful picketing. *American Federation of Labor v. Swing et al.*, 309 U. S. 659 (1940).

<sup>18</sup> Since the questions of freedom of speech and rights of peaceful picketing are so often involved in the issuance of injunctions, it might be well to note briefly the decisions in the case of *Thornhill v. Alabama*, 301 U. S. 88 (1940). The question of an injunction was not involved; an Alabama law of 1923 made it a misdemeanor to picket a place of business even though done peacefully. Thornhill, who was convicted under the act, appealed it to the Supreme Court. The law was held to be an invalid prohibition of constitutionally guaranteed rights.

<sup>19</sup> As will be shown in Ch. XXV, the Taft-Hartley Labor Management Relations Act, 1947, changed the situation so that a strike is held to threaten national safety or welfare.

<sup>20</sup> Millis, H. A., and Montgomery, R. E., *op. cit.*, Vol. III, p. 651.

<sup>21</sup> See below, Ch. XXV.

influence that it has had on state legislation. It was reported that in 1941 there were twenty-four states that had some sort of anti-injunction legislation, but not all of these laws were comparable to the federal law.<sup>22</sup> In 1947 it was reported that there were sixteen states that had on their statute books anti-labor-injunction laws much like the Norris Act.<sup>23</sup> Although state laws dealing with labor injunctions were enacted as early as 1913, in Kansas and Arizona, the more uniform and comprehensive laws on the subject did not evolve until much later, Wisconsin and Pennsylvania taking the lead in 1931 with laws that foreshadowed the federal law and the other state laws.

Generally, these state laws are for the purpose of ensuring the right of workers to organize and bargain collectively through representatives of their own choosing. The laws normally forbid state courts to issue in labor disputes injunctions that would prohibit certain acts; in addition, certain compulsory conditions are stipulated for those instances when injunctions are granted. These provisions of the laws are generally quite similar to those that were enumerated above for the federal law; they need not be repeated. In most of the laws a labor dispute is defined in a manner comparable to the definition in the Norris Act and most make provisions similar to the federal ones concerning jury trial and the proof of responsibility if a union officer or member is to be held liable for actions of the union. While most of the state laws declare yellow-dog contracts contrary to public policy, Connecticut, Maine, Massachusetts, New Jersey, and New York do not do so.

Many states have enacted anti-injunction legislation; many others have not. In the latter group, unless the change in attitude of the Supreme Court has influenced the situation, injunctions may issue as freely as ever from state courts. The experience in Ohio, a state which had not by 1948 enacted such legislation, shows that even after the passage of the federal law many injunctions still were issued in labor disputes. In five Ohio cities in the fiscal years 1934 through 1938 fifty-five injunctions were issued.<sup>24</sup> These were issued in fifty-one cases at the request of employers, in two cases against employers, and in two cases in inter-employee disputes.

The nature of these restraints is of interest in that they show the type of controls that may still issue from many state courts. While

<sup>22</sup> Millis, H. A., and Montgomery, R. E., *op. cit.*, Vol. III, p. 647.

<sup>23</sup> Connecticut, Idaho, Indiana, Louisiana, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, North Dakota, Oregon, Pennsylvania, Utah, Washington, and Wisconsin. See: Prentice-Hall's *Complete Labor Equipment*, Vol. 3, *State Labor Laws*.

<sup>24</sup> Cleveland, Columbus, Dayton, Toledo, and Youngstown. See: Mathews, R. E., and others, "Survey of Ohio Practice in Issuance of Labor Injunctions." *Ohio State University Law Journal*, June, 1939, Vol. 5, No. 3, p. 289-329.

other courts in Ohio or other states may not take exactly the same attitude toward labor, it seems reasonable to assume that somewhat similar conditions will be found elsewhere. The study of conditions in Ohio stressed the fact that injunctions are rarely written by the issuing judge; they are usually prepared by the plaintiff's legal counsel and submitted to the judge, sometimes after consultation with attorneys for the defendant, sometimes without such a discussion. The judge is free to make any changes that he considers desirable, but the nature of the restraints indicates that relatively little changing is done. With such an origin, it is not surprising that the restrictions are sometimes severe.

One significant fact shown by the study was that *ex parte* orders, those issued without hearing, composed one-fourth of all the orders issued. Another important factor was the apparent willingness to enjoin peaceful and lawful behavior. In various orders actions such as the following were enjoined: public assembly, all publicity concerning a labor dispute, persuading to join a union, peaceful picketing, and persuasion of potential employees not to seek employment. These prohibitions were in addition to the standard ones enjoining violence, insults, defamatory publicity, or threats. The conclusion by the investigators was that the injunctions issued tended to have a harmful effect on the ability of worker groups to carry their disputes with employers to a successful conclusion.

It may be said that where injunctions are unfairly issued they will be dissolved or revoked on hearing by a higher court on appeal. Such may be the case, but a subsequent removal of an injunction does not mean that justice has been done. As Professor Mathews puts it, "Injunctions in labor controversies stand alone in the finality of their effect."<sup>25</sup> This is true because it is not possible to maintain the *status quo* in a labor dispute. One of the collaborators on the Ohio study gives an example that points up this fact. An injunction was issued restraining a local of the motion picture operators' union from trying to organize the operators of a special eight-day showing of a motion picture to be exhibited in a wrestling arena. Three days after the injunction was issued the union asked for dismissal of the writ, since it was issued without notice. A week later the court sustained the motion and canceled the injunction. But by that time the order had had its desired effect; the showing was completed with non-union operators.<sup>26</sup> Whatever one's sympathies toward attempts by a union to organize non-union workers, the fact remains that an injunction later dissolved by the court, implicitly admitting its unwisdom, was used to stop the union just as effectively as if it had been sustained later.

<sup>25</sup> Mathews, R. E., *op. cit.*, p. 320.

<sup>26</sup> *Ibid.*, p. 305.

Justice Black's comments in his dissent in the *Meadowmoor Dairies Case*<sup>27</sup> points up this fact even more clearly perhaps than the above case. Commenting on the period that the case had been in the courts, he said, "It was eight months after this (the violence of the milk strike) before the Supreme Court of Illinois directed a more stringent injunction . . . ; and seven years before this court sustained the injunction. . . ." As it happened, in the *Meadowmoor* case the federal High Court upheld the injunction. Even if the view of Justice Black had prevailed, it would have had no influence on the solution of the dispute that gave rise to the injunction. Except in so far as it might serve as a precedent, the appeal and subsequent reversal of an equity order does not mean a great deal. Long before the final order is given the dispute will have been settled in one way or another.

The effectiveness of anti-injunction legislation remains to be examined. Although there have been no recent studies of the number of injunctions issued, the generally held opinion is that the Norris Act sharply decreased the number of injunctions and the sweeping nature of those that still issued from the courts. Professor Segal concluded, at the close of his study of the Norris-LaGuardia Act and the Courts, that the federal Supreme Court under the new law had "gone a long way from the *Bedford Stone* case, *Duplex v. Deering*, *Truax v. Corrigan* and the *Hitchman* decisions."<sup>28</sup> In his opinion, the act meant that organized labor was no longer so vulnerable to the constant threat of the federal labor injunction.

Since the state anti-injunction laws are so similar to the federal law, experience therewith is similar. Although not all injunctions have been stopped, the number has been decreased and the nature of the prohibitions brought more into line with what was necessary as a last resort to prevent irreparable damage to property. Professor Mathews is of the opinion that in a state that has no such law the enactment of one would make a great difference in the equity practice of the courts. Commenting on the contention that the enactment of such a statute would only declare existing practice, he expressed the opinion that the study made under his supervision met that contention squarely.<sup>29</sup>

The desirability of anti-injunction legislation is not easily assessed. Even if it were concluded that too many union actions are not subject to control by injunctions, the laws that imposed the restrictions on the issuance of such orders are entirely understandable. They were a part of the general enactment of pro-labor legislation that came, mostly in the 1930's, as a reaction to the traditional practice

<sup>27</sup> 312 U. S. 287 (1940).

<sup>28</sup> Segal, M. J., *op. cit.*, p. 30.

<sup>29</sup> *Ibid.*, p. 319.

of legislatures and the courts of dealing with workers as second-class citizens. In addition, there had been many specific abuses of the injunction as it was applied in this country to labor disputes. But has the reaction gone too far; has too much union activity been declared outside the area of equitable relief? In the *United States v. Hutcheson* case, for example, a jurisdictional dispute in which the employer was caught between the contesting unions was held non-enjoinable. There is no question but that as unions grow larger and stronger the possible harmful effects of their actions become greater. And with the well-developed legal theory of our society that holds intangible rights to be property, it seems unreal to argue that they should not be protected.

With stronger unions and the possibility that by economic action they can do irreparable damage to intangible property rights, questions of the extent to which these rights should be protected become more complex. Undoubtedly, the common practice up to the 1930's was, throughout the country, to restrict the actions of workers severely. That practice seems still to prevail in some cases where states have not enacted anti-injunction laws. In the federal courts and those of the sixteen states with laws like the Norris Act excessive court controls issued at the request of private employers seem, at this writing, to have been stopped. Some mistakes may have been made in the interpretation and application of the laws so as to permit questionable action on the part of the unions. Nevertheless, the over-all result has been beneficial, and similar laws are needed in the other states.

### Questions

1. What were the objectionable court decisions of the twentieth century that gave rise to some of the restrictions found in the Norris-LaGuardia Act?
2. Did the Norris-LaGuardia Act change in any significant manner that which previously had been held to be good injunctive practice? Defend your answer.
3. Evaluate the definition of "labor dispute" that is found in the federal anti-injunction law. Is it a reasonable definition? How significant has it been in the effective working of the law?
4. Has organized labor been freed to an undesirable extent, since passage of the Norris-LaGuardia Act, from the application of the anti-trust laws?
5. Was the Norris-LaGuardia Act intended to promote a "New Deal" type of philosophy of the labor movement or was it merely an attempt to correct an obvious abuse of judicial power? Why?
6. In view of the speed of the judiciary, especially in appeals cases, what are likely to be the net results of appeals of injunction cases even should the apparent result be a decision favorable to labor?

## CHAPTER XVI

### THE NATIONAL LABOR RELATIONS ACT: BACKGROUND AND PROVISIONS

#### Background of the National Labor Relations Act

Questions may logically be raised concerning the need for discussion of the National Labor Relations Act at some length in view of the extensive revision of the act by the Labor Management Relations Act, 1947, commonly called the Taft-Hartley Law. However, because of the great significance of the earlier law, because a considerable portion of the principles established under it remained even after the revision, and because of the doubtful constitutionality and permanence of some of the provisions of the Taft-Hartley Law, it seems advisable to survey the National Labor Relations Act rather fully.

There is no one line of legislation or court decisions that can be traced to show the background of the National Labor Relations Act; its roots are sunk in a number of unfair labor practices of employers that were commonplace in the early 1930's and prior to that time.<sup>1</sup> In earlier chapters the use of the labor injunction to forestall organization of workers has been traced, noting the abuses that finally led to enactment of the Norris-LaGuardia Act and a number of similar state acts. Significantly, the Norris Act not only limited the power of federal courts to issue injunctions in labor disputes, but it declared for the first time the public policy of the federal government that workers should have the right to join unions if they so desired.

Another abuse that has been noted is the application of the anti-trust laws to organized labor. This application is so entangled with the issuance of labor injunctions that it is not entirely separable, but it is clear that, whatever Congress intended when enacting the Sherman and Clayton Acts, the anti-trust laws have been used effectively against labor in many instances. This has occurred at the

<sup>1</sup> The unfair and discriminatory practices were numerous and varied. Perhaps the best study in recent times was made by a Senate Subcommittee on Education and Labor under the chairmanship of Senator LaFollette. The exhaustive hearings and data showed frequent use of labor spies, company police, and industrial munitions to discourage union organization. The use of strikebreakers was common and a standard "formula" for strikebreaking was frequently used in the late 1930's. Discharge and blacklisting of union men and sympathizers was common. All in all, many effective means of denying workers the right to organize and bargain collectively were used.



same time that larger and larger business combinations have been growing up in various industries and all parts of the country.

Another source of the new government policy was the stamp of approval upon the unionization of workers given by the federal government at the time of the first World War. During that time the government sanctioned, purely as a war measure, the right of workers to join unions. The experience that came from that period demonstrated the desirability of some sort of organization among workmen. However, while this fact seemed clear, there certainly was no agreement as to the type of organization that was desirable; nor was the theory that unionism was desirable supported by practical plans to put the theory into practice.

Similarly, the sanction of unionism found in Section 7 (a) of the N.I.R.A. was another forerunner. Again in this instance practical plans for enforcement of the sanction did not materialize.

A final bit of experience that helped to account for the new government policy came from railway labor legislation. This is yet to be examined,<sup>2</sup> but it should be noted here. Since 1926 the federal Congress had guaranteed the right of railway employees to join unions if they so desired. This legislation had been approved by the Supreme Court and had been working out in a relatively satisfactory manner prior to the enactment of the National Labor Relations Act.

Thus, from various abusive practices of employers toward organized labor that were widely recognized and from some slight experience with policies favoring union organization came a shift in the traditional labor policy of the federal government. This shift was accelerated by the advent of the depression of the thirties that gradually weakened the position of labor, making both organized and unorganized workers less able to handle their own problems. Wages and standards of living dropped rapidly and enhanced the downward spiral of the depression. Contrary to the assumption of many persons, the move to ensure the rights of workers to organize was not entirely a product of the Roosevelt administration; the enactment of the Railway Labor Act in 1926 and the Norris-LaGuardia Act in 1932 indicates this fact. However, the movement that was perceptible before the election of Franklin D. Roosevelt was speeded up and broadened under his guidance.

#### The N.I.R.A. and the right to organize

In 1933 the federal government made its first attempt at a legislative guarantee of the right of workers to join unions if they desired.

<sup>2</sup> See below, Ch. XX.

That the attempt was destined for judicial overthrow does not make it less significant. Under the National Industrial Recovery Act, provision was made for the preparation by representatives from various industries of codes of fair competition. For the student of labor legislation, Section 7 (a) is the portion of the Recovery Act of most interest. This section required that every code of fair competition contain the following provisions:

"(1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection;

"(2) That no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing."<sup>3</sup>

It became evident before much time had elapsed that the N.I.R.A., hurriedly conceived and drawn, could not be properly applied without some administrative body. This was especially true of the controversial Section 7 (a). It became more clear as numerous codes were established containing the required guarantees of labor's right to organize.<sup>4</sup> These stated rights were new and in many instances contrary to the traditional attitude of employers. In addition, the codes contained varying provisions on matters such as minimum wage rates, maximum hours, and overtime rate. Although the original codes were prepared by representatives of industry, the provisions did not suit all the members of the various industries.<sup>5</sup> Thus, because of the traditional opposition of a majority of employers to labor organization and the opposition of some to various other labor provisions of the codes it was certain that there would be many instances in which accusations would be made that the codes were not being observed.

Recognizing this fact, President Roosevelt established in August, 1933, a National Labor Board with three employer and three employee representatives and an impartial chairman representing the public. Senator Robert Wagner was named chairman and William

<sup>3</sup> Section 7 (a), N.I.R.A., 49 Stat. 195, 1933.

<sup>4</sup> 535 industrial codes were approved by the middle of December, 1934. U. S. Bureau of Labor Statistics, Bulletin No. 616, *Handbook of Labor Statistics*, p. 512. Washington, D. C.: U. S. Government Printing Office, 1936.

<sup>5</sup> Occasionally labor representation was found on the industrial code-making groups. In general, however, labor clauses were unilaterally written into the codes because they were required by the N.I.R.A.

Leiserson, executive secretary; the representatives of management and labor included Leo Wolman, Walter Teagle, William Green, John L. Lewis, Gerard Swope, and Louis Kirstein. The powers and duties of the board were rather vaguely stated at first. They were to include: (1) settling controversies between employers and employees that tended to impede the purposes of the National Industrial Recovery Act; (2) establishing local or regional boards, similar in composition to the national board, to which duties of the national board could be delegated; (3) reviewing the determinations of the lower boards; and (4) making rules and regulations governing the procedure to be followed in discharging its functions.

Acting under its power to establish subordinate boards, the National Labor Board set up nineteen regional labor boards by March, 1934. By July 1, 1934, the board and its regional counterparts had handled 4277 cases, settling slightly over four-fifths of them. Nearly two-thirds of the cases involved alleged violations of Section 7 (a).

In February, 1934, the President issued an order specifically directing the enforcement of Section 7 (a). In this task the board was to designate, when necessary, appropriate representatives for collective bargaining. Refusals to abide by the labor provisions of the codes were to be reported by the board to the administration of the N.I.R.A. for action, a very weak enforcement means indeed.<sup>6</sup> Actually, the strongest threat to bolster enforcement was that of the removal of the "Blue Eagle," symbol of cooperation in the recovery effort. This was inadequate to provide for effective enforcement. Some concerns paid no attention to the board and its action. Consequently, it went out of existence on July 9, 1934; its functions were assumed by another board—the first National Labor Relations Board.

Meanwhile, Senator Wagner, chairman of the original National Labor Board, was learning from experience in his position on that body. He saw the ineffectiveness of appeals to patriotism as a basis for enforcing a code of behavior when some provisions of that standard conflicted with economic interests or desires. Where such conflicts, real or imagined, developed there was need of legislative standards and means of enforcement rather than of requests for observance of the law. As a result of his observations, early in 1934 the Senator introduced into Congress a bill guaranteeing to workers the right to collective bargaining by specifying as unfair a number of practices of employers that tended to deny this right. The bill

<sup>6</sup> Executive Order 6580, dated February 1, 1934. Executive Order 6612-A was intended to improve enforcement by providing that the board could report findings on violations, with recommendations, to the Attorney General for possible prosecution. This was in addition to referral to the Compliance Division of the N.I.R.A.

provided for an administrative board to apply the act. Failing to enact this bill into law, Congress did pass a joint resolution<sup>7</sup> that authorized the President to create a board or boards to investigate disputes arising over Section 7 (a) or any that threatened to burden the free flow of interstate commerce. These boards could conduct elections to determine appropriate representatives for collective bargaining.

### The first National Labor Relations Board

When the first National Labor Relations Board was created<sup>8</sup> it was given essentially the functions that were authorized in Public Resolution No. 44. In contrast with its predecessor, the new board was composed of three men, all representing the public: Lloyd K. Garrison, Harry A. Millis, and Edwin S. Smith. As was true of its predecessor, it had little power to enforce anything and it was not an agency to administer Section 7 (a) alone. Rather, it was a dispute-settling agency, with a majority of its cases arising over allegations that Section 7 (a) had been violated.

In addition to trying to settle disputes, the new board had the task of designating appropriate bargaining units and employee representatives in those units; it was hoped that this service would result in fewer disputes. In naming proper bargaining representatives, the board could hold elections; the elections were to be held when the parties so agreed, and if they failed to agree the board could order that an election be held. The board exercised its power to order elections in thirty-six cases. In nine instances requests for elections were denied on the grounds that an election was not in the public interest.

Since the new board was to perform nearly the same functions as the National Labor Board, it took over the regional labor board organizations. One of the weak points of the board was, as in the case of its predecessor, inability to enforce rulings. Removal of the "Blue Eagle" did not put heavy pressure on an employer to comply. Although the orders of the new board were not subject to executive review, its decisions were to be transmitted to the President through the Secretary of Labor. Its activities were limited to disputes involving the right of workers to organize and to questions of representation and anti-labor discrimination.

The number of cases handled by the first National Labor Relations Board was not impressive. From July 9, 1934, until its demise on July 16, 1935, subsequent to the Schechter decision invalidating the

<sup>7</sup> Public Resolution No. 44; 73rd Congress, approved by the President June 19, 1934.

<sup>8</sup> Executive Order 6763, dated June 29, 1934.

codes, it handed down only 227 decisions. However, this figure is slightly misleading. The joint resolution of Congress passed in 1934 authorized the President to establish a board or boards, as he saw fit, to handle disputes. Acting under this authority, he appointed three special boards, the National Longshoremen's Labor Board, the National Steel Labor Relations Board, and the Textile Labor Relations Board. The Longshoremen's Board was named to investigate the Pacific Coast longshoremen's strike while the Steel and Textile Boards were to do in their respective industries much the same thing as the National Labor Relations Board did in others.

The Longshoremen's Board rendered its reports on the strike in question and did nothing more. On the other hand, the board in the steel industry acted upon forty-two cases and was functioning until the Schechter case stopped actions; cases pending at that time were dismissed. The textile industry board held fifty-two hearings but issued only six final decisions. This record looks especially poor in view of the fact that the board reviewed over 1600 complaints involving nearly 580 mills; the hearings held involved complaints against forty-eight mills.<sup>9</sup> Altogether, the functioning of the first National Labor Relations Board and the special boards acting with it was far from impressive. But the work was pioneering action that set the stage for the subsequent creation by specific legislation of the second National Labor Relations Board in 1935.<sup>10</sup>

It is difficult to evaluate Section 7 (a) and the boards that were established to administer it. There was no agreement as to its desirability, many persons in business and the professions believing such a guarantee to be unwise and ill-advised. The section was based on the assumption that it was desirable for labor to be organized in unions independent of employer control. Strong, non-dominated unions would enhance the bargaining power of workers, which would in turn enable them to get for themselves more adequate wages, better working conditions, improved dispute-settling

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<sup>9</sup> U. S. Bureau of Labor Statistics, Bulletin No. 616, *Handbook of Labor Statistics* (1936 edition), pp. 12-16.

<sup>10</sup> Two other special labor boards might be named in passing; both were agencies of the recovery effort. The Automotive Labor Board was established by the President in March, 1934. It was to function only in labor disputes in automotive manufacturing in which both parties agreed to present to the board and to hold themselves bound by its decision. Most of its work dealt with seniority cases, but it settled a number of strikes and conducted a few collective bargaining elections. The Petroleum Labor Policy Board was formed by Secretary of Interior Ickes late in 1933 to advise him on policies concerning petroleum labor and questions arising from the enforcement of the codes; it was also to attempt to settle disputes and to try to obtain compliance with the labor provisions of the codes in petroleum. Most of its work arose from alleged violations of the code wage-hour provisions, although some other cases were submitted to it.

methods, and so forth. Such an idea was not new; the courts and the lawmakers had given lip service to it for a century, and most labor economists are strongly of the opinion that organization of workers is desirable. Whatever the attitude of certain groups with vested interests relevant to the organization of workers, the attempt of the federal government to extend such guarantees to a great number of workers all over the country was unprecedented in the United States but highly desirable. In any social or economic movement that is a pioneering one many errors are certain to be made. Undoubtedly, mistakes were made in this case, but the very mistakes highlighted pitfalls that should be avoided in the future.

The activities of the boards were also of value.<sup>11</sup> Clearly, they could have done a better job if there had been some power of enforcement. Even without such power, the boards reported the settlement of over 1700 disputes. Not all of these disagreements hinged on the rights protected by Section 7 (a), but many did. Every instance in which the boards figured in the equitable settlement of a dispute was a contribution to current and future peace in labor relations. Another important contribution was that of holding elections, a new method of promoting collective bargaining on the basis of appropriate bargaining units and of trying to assure that bargaining was done by the representatives desired by the workers.

### The National Labor Relations Act

President Roosevelt and his advisors (and to a lesser extent, the 73rd Congress) were not easily distracted from a goal once it had been established. So the ruling by the Supreme Court in the *Schechter* case did not stop "New Deal" experimentation. Consequently, the guarantees of Section 7 (a) were soon to reappear in Congress in a separate piece of legislation. However, the policy when restated was set forth as a law rather than as a joint resolution or an executive order. The enactment restating the guarantee that had been Section 7 (a) was destined to become one of the most debatable economic controls ever passed in the United States.

It has already been noted that the federal government must use as a basis for labor regulations either the power to tax or the power to regulate interstate commerce. There was no readily observable relationship between organization and taxing power. Thus, the National Labor Relations Act,<sup>12</sup> proposing to guarantee labor's right to

<sup>11</sup> For the specific decisions rendered by the Boards see: *Decisions of the National Labor Board*, Vol. I, Parts I and II, 1934, and *Decisions of the National Labor Relations Board*, Vol. I, Part III and Vol. II, 1935, both published in Washington, D. C. by the U. S. Government Printing Office.

<sup>12</sup> 49 Stat. 449, 1935.

organize, was founded on the commerce power. In order to convince the public of the relationship between the regulations imposed by the law and interstate commerce, Congress preceded the act with a lengthy statement of "Findings and Policy." The statement is of interest for its reasoning; it read, in part:

"The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest which have the intent or the necessary effect of burdening or obstructing commerce. . . .

"The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

"Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards . . . and promotes the flow of commerce.

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions where they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

This statement of findings and policy was, as stated, partly intended to convince the courts of a relationship between unionism and commerce. However, the statement is of interest for the economic theory implicit therein. Most of the "New Deal" economists supported the doctrine that a more even distribution of income was needed to revive and retain prosperity. The espousal of the right of workers to form unions independent of employer control was in part an attempt to guarantee basic rights of individual workmen, but it was also an attack on the depression. Unions were a means to an end; they could bring higher wages and greater purchasing power to workers.

With the basic policy stated above, the general nature of the law could be surmised. The gist of the law is found in Sections 7 and 8. Section 7 states:

"Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

In order to effectuate this guarantee, Section 8 listed five unfair labor practices prohibited to employers covered by the act. These were:

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

"(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. . . .

"(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act . . . or in any other statute of the United States, shall preclude an employee from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees . . . in the appropriate collective bargaining unit. . . .

"(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

"(5) To refuse to bargain collectively with the representatives of his employees, . . . ."

Such were the key prohibitions of the National Labor Relations Act; the remainder of the law defined the terms used and the broad outline of the machinery needed to administer it. It should be noted that the law as passed specified only the rights of workers and the duties of employers. Nothing was said that in any way indicated duties or responsibilities of workers or unions or any rights of employers. Probably this one-sidedness was, to the average person, the most objectionable feature of the act; in the post-World War II period it gave an excellent talking point to the act's opponents, who seized upon the occasional irresponsible acts of unions to attack the National Labor Relations Act and demand its revision or repeal.

Most labor leaders, however, defend the manner in which the law was drawn. They maintain that, without guarantees of workers' rights to organize in unions of their own choosing, many employers would refuse to allow unionization. And as for a requirement that unions bargain collectively, it is argued that such a law is not needed because collective bargaining is essentially the only purpose of unions. It may be true, in a technical sense, that no legislation is



needed to compel a union to bargain. But the manner in which bargaining is done is another matter. There is little doubt that the bargaining practices of some unions are not, from the start of negotiations, serious efforts to find a mutually satisfactory and workable solution to some controversial issue that has brought the parties together in a bargaining conference. Early negotiations often seem to be the time when union leaders seek to publicize their position rather than to get down to earnest examination of points in dispute.

A number of definitions in the act are of importance in understanding its meaning and coverage. As to the latter, the law extended only to employers and employees who were engaged in commerce or industries affecting commerce. Thus, employees of the United States or any state or political subdivision thereof were not covered; neither were those persons who were subject to the Railway Labor Act. Also, agricultural laborers and domestic servants were excluded, as were persons working for parents or spouse.

The term "commerce" was not difficult to understand; essentially, it referred to all commerce between the states or territories or between them and any foreign nation. The expression "affecting commerce" was not so clear; because it is the term that broadened the coverage of the law the exact definition is reproduced here. "The term affecting commerce means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." Under such a definition, almost any firm that shipped goods in commerce would have been subject to the law. Although some administrative and court opinions were necessary to indicate exactly what quantity of goods should be shipped in commerce to subject a firm to the law, there was nothing in the act itself that prevented application of the law where shipments in commerce were extremely light. It probably should be noted in addition that the law did apply to workers in the District of Columbia and the Territories whether the employer shipped goods in commerce or not.

Since the law was designed to lessen the number of labor disputes that affected commerce, or to try to settle them, the term "labor dispute" also was given a very broad connotation. It was defined as "any controversy covering terms, tenure, or conditions of employment, or concerning the association or representations of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee." This definition, similar to that in the Norris-LaGuardia Act, made it possible for non-employee representatives of an outside union repre-

senting the workers to bargain with employers. The refusal of employers so to bargain gave rise to many labor disputes under the jurisdiction of the administrative board that is to be discussed presently.

It is interesting to note that Congress did not define or give any indication of the meaning of some of the most vague terms of the act. Thus, there were no guideposts to indicate the connotation of "bargain collectively" or "restrain or coerce employees" or "the unit appropriate for the purposes of collective bargaining." As we shall see in the next chapter, the lack of any definition of some of these terms has necessitated a large amount of interpretation. The omission of such definitions has given the National Labor Relations Board much leeway in making decisions. Whether this is good or bad depends on the composition of the board and the reactions of individuals.

### The administrative organization

To administer the act, a three-man National Labor Relations Board was created. The members, all representing the public, were first appointed for one- three- and five-year terms respectively; subsequent appointments were for five-year terms. Members were paid \$10,000 per annum and were eligible for reappointment. When the members of the board were appointed, the "first" National Labor Relations Board, created pursuant to Public Resolution 44, ceased to exist. Employees of the old board, records, papers, property, equipment, and unexpended funds all were transferred to the new agency. The board was empowered to establish a field staff to carry out its functions. And the national board could make, amend, and rescind such rules as it deemed necessary to carry out the provisions of the act.

In establishing its field organization, the board had in 1946 twenty regional offices in key cities of the United States plus offices in Hawaii and Puerto Rico. Since the great majority of cases were filed in the regional offices, these were important parts of the organization. Each such office had a staff including a director, a number of examiners and lawyers, and clerical help as needed. These regional offices were on the firing line, in so far as the act was concerned, interpreting and applying it as its officers saw fit, subject always to guiding decisions, or overruling, from the national office.<sup>13</sup>

In administering the act, the task of the board was twofold: (1) to prevent or remedy unfair labor practices of employers that might

<sup>13</sup> When especially novel problems confronted the regional boards, they could send "Requests for Advice" to the national office. Despite this fact, the regional officers had a heavy responsibility in interpreting the act.

tend to discourage organization of their workers or interfere with or discourage the practice of collective bargaining, and (2) to determine appropriate bargaining units and representatives desired by workers for collective bargaining. The board did not have authority over any other type of labor dispute; a matter of wages or hours, for example, could not be brought before the board unless wages or hours were being manipulated in such a way that there was discrimination against union or potential union members. However, the board's authority was not limited to cases in which there was a formal union or union activity; unfair labor practices directed against informal or spontaneous groupings of workers were subject to the scrutiny of the board just as they would have been if directed against any independent union.<sup>14</sup>

#### Procedures under the act

It is not intended to discuss in this chapter the manner in which the law was interpreted and applied, but it is desirable to outline the general procedure under which an unfair labor practice or a representation case was handled. Let us note the manner in which the law functioned in an unfair labor practice case. First of all, the board or its representatives could not investigate such a situation on their own initiative. They might have had every reason to believe that there were unfair labor practices in existence in a certain plant, but until the time that some individual or labor union filed a charge with the regional director alleging that unfair practices had occurred the hands of the board were tied.

Once charges were filed, a field examiner was assigned the task of making an investigation to gather all pertinent facts; the employer was notified of the nature of the charge and asked to supply the regional office with his version of the state of affairs. The person who filed the complaint was encouraged to submit a written statement or affidavit giving information concerning the unfair labor practice. After the parties to the dispute supplied information the field examiner could interview persons with a knowledge of the situation. Once the investigation was completed and the report of the field examiner made, the case could be disposed of by withdrawal of the charge, dismissal, or settlement.

If the investigation indicated either that there was no violation of the unfair labor practices section of the act or that the board did

<sup>14</sup>For an excellent popular presentation of the powers and procedures of the board see: Division of Labor Standards, U. S. Department of Labor, Bulletin No. 81, *A Guide to the National Labor Relations Act*. Washington, D. C.: U. S. Government Printing Office, 1946. The following pages contain much material based on that pamphlet.

not have jurisdiction over the particular issue, the regional director recommended withdrawal of the charge by the person or organization that filed. In case of withdrawal, the employer was notified and that was the end of the matter. There is one interesting fact, however, concerning the withdrawal of cases. Although the board could not act unless some person or organization filed charges, once filed, the board did not have to permit withdrawal if it did not choose to do so. The purpose involved herein was the prevention of settlements that would not have been in keeping with the principles upon which the N.L.R.A. was based. Thus, an employer who sought to make a money payment to the workers in return for a withdrawal might not succeed in getting the charge withdrawn if the regional director decided that the settlement did not adequately live up to the standards of labor practice specified in the N.L.R.A.

If the aggrieved party did not wish to withdraw a complaint in compliance with the recommendation of the regional director, the latter could dismiss the case. In notifying the parties of his action, the director followed the practice of calling to the attention of the complainant the fact that he could appeal his case to the national board within ten days. That body could support the dismissal or direct further investigation.

In case the investigation of the field examiner showed that there was merit in the charge, there were two general methods of settling the matter. The one which was tried first, probably by the field examiner, was an informal settlement without proceedings. The idea was that informal and voluntary settlements were the ones most likely to prove effective in the long run. For such a settlement to be acceptable, the employer had to be willing to take the action necessary to remedy the unfair labor practices found to exist. This action might consist of reinstatement of workers, bargaining collectively, or other action dictated by the findings of the investigator. All such informal agreements were subject to the approval of the regional director; no cases were to be closed in the regional office without proof of compliance, including posting of notices of the agreed settlement. Failure of an employer to live up to such a settlement might have lead to the issuance of a formal complaint by the regional director.

Informal settlements such as those noted above accounted for the great majority of all the unfair labor practice cases that came before the board. It is reported that up to mid-1946 over ninety per cent of all cases were withdrawn or settled informally. At least two-thirds of the cases that were not withdrawn were settled by agreement of the parties in the manner outlined in the foregoing paragraph.

If the investigation indicated that the charges had a basis in fact and if efforts of the field examiner to bring about an informal settlement showed no results, a formal complaint and notice of hearing was issued. The complaint was served on all parties and contained a formal statement of the unfair practices with which the employer was charged. The latter had ten days in which to answer the complaint, setting forth his defense. This filing of the complaint was the first formal action taken in a case. The fact that the employer had only ten days in which to answer the complaint was not quite so restrictive as might be thought. In most instances he knew before the end of the field examiner's investigation and attempts at settlement precisely what the situation was and whether or not he intended to settle voluntarily or fight the case. Therefore, his preparation for defense could begin in advance.

After a formal complaint had been issued, or even after the hearings, the parties still might get together to settle the issue voluntarily, although the settlement had to be in keeping with the provisions of the law. Under such a settlement, the parties and a representative of the board signed an agreement that the board could issue an order directing certain action required to remedy the unfair labor practices and that it would be accepted. Frequently, the agreement included employer consent to a decree from the Circuit Court of Appeals that embodied the terms of the board order. All such agreements were subject to the approval of the national board. In case of failure of the employer to comply with the terms of the agreement, the board petitioned the Circuit Court for enforcement. However, in instances when the settlement included agreement to the entry of a court decree, the board would then seek to have the company held in contempt of court.

But suppose a case arose, as was infrequently true, in which all attempts at informal settlement were to no avail; what happened then? A formal hearing was held, usually near the location of the trouble spot giving rise to the case. The hearing, open to the public, was before a presiding trial examiner from Washington. Both the board and the defendant employer would be represented by attorneys at this stage, an attorney from the regional office handling the government's case. The trial examiner and all parties to the hearing had a right to call witnesses and examine or cross-examine them. Subpoenas could be issued by the trial examiner to require attendance and testimony of a reluctant person.

When the hearing was concluded, the trial examiner prepared an intermediate report summarizing his findings of fact and his recommendation for disposal of the case. His recommendation could be for dismissal or for certain actions to be taken by the employer in

order to remedy the unfair labor practices found to exist. Copies of the report were sent to all parties and to the national board. Although this report was not final, it indicated what was likely to be the ultimate action of the board and gave the parties a final basis on which to agree voluntarily without a formal order of the board. However, either party had ten days within which to ask permission to appear before the national board for oral arguments on the case; either party also had fifteen days in which to file exceptions to the report.

The final step in a case that was carried to the bitter end was the review of the entire record of the case by the national board; this might be with or without oral arguments by the parties involved. The board could order dismissal of the complaint if it found no violation of the law. If it did find a violation, it directed the employer to cease and desist from certain labor practices proscribed by the law and to undertake certain actions to remedy the unlawful practices. Along with the remedial action directed, all board orders required the employer to post notices containing the terms of the order.

Subsequent to the order of the board, the regional director from whose region the case arose contacted the employer to work out the terms under which the order was to be effectuated. If the employer was willing to comply and took the necessary steps, the director made an investigation and reported the facts to the national board. If these were acceptable to the board, the case was closed, but only for as long as the employer continued to observe the terms of the directive.

The act did provide that "any person who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this Act shall be punishable by a fine of not more than \$5,000 or by imprisonment for not more than one year, or both," but there was no provision for the enforcement of board orders. If an employer was unwilling to comply with an order, the board could request the Circuit Court of Appeals to enforce it; conversely, the employer might petition the same Court to set aside the order. Either party of course had the right of appeal to the Supreme Court.

When the Circuit Court reviewed a board order and directed its observance, the first actual compulsion entered the case. Failure to observe a court decree made the violator subject to punishment for contempt of court. After court direction of observance of an order, the board was to investigate to ensure compliance, and if such was not found to report its findings to the court.

The power of the board to issue orders amounted to putting the

injunction shoe on the other foot. By procedures similar to court injunctions the power of a government body to direct the performance or the cessation of certain actions put many employers in a position in which they could not deal with the attempts of their workers to organize as they might have liked. Essentially, labor shifted within a period of five years from a condition in which it bore the brunt of numerous injunctions to one in which it enjoyed numerous quasi-injunctive orders in its favor.

#### Determination of bargaining units and representatives

It has been said that the other function of the board was to determine the proper representative for the purpose of collective bargaining. This was essentially a double question or problem involving the determination (1) of the appropriate bargaining unit, and (2) of the proper representative of the workers in that bargaining unit. These problems again arose out of requests made to the board; it could not act on its own accord. Up through World War II either a union or, under certain conditions, an employer could petition the board to certify the proper bargaining agent. The union might file a petition at any time that it felt itself in a position to win an election or otherwise prove that it was the proper representative. The employer, on the other hand, could file a petition only if two or more unions each claimed to represent a majority of the employees. The purpose of this provision was so that an employer would not be able to call for an election at a time when he could influence in some way the outcome of an election. While he was restricted in his right to petition for election, the employer was within his rights to refuse recognition if he had an honest doubt as to whether the union demanding recognition actually represented a majority of the employees in the appropriate bargaining unit.

More needs to be said in the following chapter about the interpretation of an appropriate bargaining unit. Many cases have arisen over this question, and the varied rulings are of interest and importance. Here we shall only note the problem. There are a number of potential bargaining units; perhaps the narrowest would be the members of one craft working for one employer, the broadest, an industrial-type organization stretching over a wide geographical area. Between these extremes there might be craft organizations on an area-wide basis, industrial organizations on a plant-wide or multi-plant basis, or perhaps some other arrangement. Since it would be an extremely rare occasion when all persons agreed on an appropriate unit for bargaining, especially in view of the conflict between the A. F. of L. and the C.I.O., the naming of the proper bargaining unit was not easy.

Let us assume that this matter was not a problem and that the petition for determination of the proper bargaining representative had been correctly filed on the prescribed forms. If such were the case, a field examiner from the regional office investigated to determine whether the union in question had a substantial interest in the representation of the unit. This could be proven by showing applications for membership, records of dues payment, or other such papers indicating representation of thirty per cent or more of the workers in the unit. Evidence of interest would also be assumed where the union in question was a party to a current or recently expired agreement covering all or a part of the workers. Finally, interest would be assumed if the employer and the unions involved agreed among themselves to a "consent election." If the conference or other investigation conducted by the field examiner showed that a question of representation had arisen and that the petitioning union had sufficient representation among the workers, he would try to effect a voluntary and informal settlement. If a question of representation had not arisen, if the union lacked sufficient representation, or if some other condition indicated there was no need of an election, the petition would be withdrawn or dismissed.

In case the petition appeared to have merit, the simplest and most obvious voluntary adjustment of the issue was by a recognition agreement. This meant that the employer and the union signed an agreement specifying the bargaining unit and the fact that the union represented a majority of the employees in the unit and that the employer recognized and would bargain with it. Such an agreement was subject to the approval of the regional director, who would require to be posted in the plant for a period of five days the text of the agreement and a notice that an interested party could contest the agreement. Failing such objection, the regional director granted approval and the case was closed.

A second type of voluntary settlement of representation cases that was allowed under the act was the consent cross-check. This, like the recognition agreement, could be used only when one union was involved. In this instance, the union and company signed an agreement indicating the bargaining unit and agreeing to have a representative of the board check some specified documentary proof of union membership, such as applications for membership or dues records, against the employer's payroll of a certain date. Once the cross-check was completed, if the union was not designated by a majority of the workers, the regional director would drop the case and notify the parties. If the union had been designated by a majority, the director required posting in the plant copies of the cross-check agreement and outcome and notice of a five-day opportunity



to contest the finding. If no such objection was forthcoming after five days, the union was officially designated as the bargaining agent and the case closed.

Still another type of voluntary settlement of representation cases—one that was used frequently—was the consent election. This could be used where more than one union was involved or where there was doubt as to the validity of union records as proof of membership. In these cases, the employer and union or unions signed an agreement setting out the bargaining unit, the date of the payroll to be used to determine eligibility for voting, and the place, date, and hours of the consent election. The employer also signified his willingness to recognize and bargain with the union designated by a majority of the employees voting in the election. This last point should be noted; the bargaining agent was named by a majority of the employees actually voting, not of those eligible to vote.

The techniques of holding such an election need not be examined in detail. Arrangements were made by a field examiner from the regional office who usually held pre-election conferences to work out as many details as possible. The actual supervision of voting and counting of the votes was done by agents of the board, with an equal number of representatives of each party present to observe and assist. Provisions were made for either party to challenge votes for reasonable cause. In case no union received a majority of the votes cast, a run-off election was required between the two unions or between one union and no-union representation, depending on which choice received the most or second largest number of votes; unless there were so many votes challenged as to affect the outcome, the run-off would of necessity result in some one choice obtaining a majority. If there were no objections within five days to the conduct of the election, the results were certified; if there were objections, the regional director investigated. In either case, his ruling in a consent election was final and binding.<sup>15</sup>

If after a petition was filed the field examiner could get no agreement or any sort of voluntary settlement, a hearing had to be conducted. This was held, after due notice from the regional director to all interested parties, before a trial examiner.<sup>16</sup> Unions wishing to participate in the hearing could ask permission to do so. How-

<sup>15</sup> Two other types of voluntary settlement might be mentioned: the stipulated cross-check and the stipulated election. For these the formal action and certification came from the national board rather than the regional director.

<sup>16</sup> However, late in 1945 regulations were changed to allow the regional director to conduct a secret ballot or decline to continue an investigation if no substantial issues were involved (such as the appropriate bargaining unit). See: *Eleventh Annual Report of the National Labor Relations Board*, p. 181. Washington, D. C.: U. S. Government Printing Office, 1947.

ever, they could take no part unless their request was granted, either by the regional director prior to the hearing or by the trial examiner while the hearing was in progress. At the hearing the interested parties were heard and allowed to submit evidence, the entire purpose being to gather sufficient data to allow the board to reach a decision. After the close of the procedures the parties were allowed one week in which to file briefs concerning the case or to request a hearing before the national board.

Upon receipt of the record of the hearing the N.L.R.B. reviewed the case, heard interested parties if they had been granted permission to appear, and rendered its decision. It could dismiss the petition if the unit sought was not an appropriate one for collective bargaining. The more likely decision was the direction of an election, in which case the board specified the bargaining unit for which the election was to be held, the unions that were to appear on the ballots, and the groups of employees that could participate in the election. The regional director usually was required to hold the election within thirty days of the rendering of the decision.

Once the election was held, according to the procedure worked out, and the results tallied and supplied to the interested parties, each one had five days in which to file objections with the regional director. Filing of such objections called for an investigation by the director, on completion of which a report and recommendation was made to the national board. There followed another five-day period in which exceptions could be filed before that body. The board might make or cause to be made a further investigation, if it saw fit, and, finally, the decision was issued either dismissing the petition, certifying a specific union as the exclusive bargaining agent, or taking other action if necessary. Of course, if there was no objection to the conduct of the election, the regional director so reported and the board certified the union receiving the majority of the votes as the exclusive bargaining agent for employees in the specified bargaining unit. In this and in the consent type of election, a run-off between the two choices receiving the highest number of votes was necessary if no one received a majority in the first balloting.

There were no provisions in the act for the enforcement of decisions issued in representation cases. Actually, there was no need for such because a failure to observe the decisions would lay the company open to a charge of unfair labor practices. The determination of the proper bargaining unit and representatives was only a means to the primary goal of the law; namely: the prevention of unfair labor practices that interfered with the right of workers to organize and engage in the process of collective bargaining. There-

fore, if the board directed on the basis of an election that some one union be designated as bargaining agent, an employer who refused to recognize and bargain with the union had committed one of the five unfair labor practices listed in the act. On the filing of a complaint, the board could start proceedings on an unfair labor practice case, which, if the employer would not "cease and desist," would end in a petition for circuit court enforcement.

#### Functioning of the board

The board reported that during its first ten years of activity nearly eighty-five per cent of all cases handled were disposed of at the regional level without formal action. In 38,000 representation cases, slightly over one-fourth were withdrawn or dismissed by the regional director and approximately one-half were settled by informal means. Slightly under one-fourth were closed by formal action. In the 36,000 unfair labor practice cases, nearly one-third were withdrawn and one-sixth dismissed by the regional director; almost forty-three per cent were settled informally and slightly over eight per cent required formal action for final closing. One interesting fact is reported in connection with the elections held in representation cases. About eighty-five per cent of those eligible to vote did so, a much higher proportion of those eligible than commonly vote in political elections, and of the valid votes cast, over 6,100,000, about eighty-four per cent voted in favor of some form of union representation.

Such were the provisions and general practices of application of the National Labor Relations Act. As has been said, it came to be one of the most highly criticized pieces of legislation ever enacted. At first glance, it is not easy to understand why the law was criticized so severely. Courts, lawmakers, and the public had given lip service for a century to the idea that workers do have the right to organize for collective bargaining. But there is considerable difference between lip service to a principle and a real effort to apply that principle and make it mean something. Perhaps the shock of the N.L.R.A. came not so much from the provisions of the act as from its application. When many employers found a sincere attempt to make the law meaningful rather than a formality, they began attempts to prove it unconstitutional and, failing this, to get legislative revision. In the latter effort they succeeded very well in 1947. The Taft-Hartley Law was the culmination of ten years of sniping at the N.L.R.A.

There is another reason why the objection to the law seems so strange. It is difficult to recall a statute that in provision and practice has had so little compulsion in it. Except for persons who wilfully resisted or interfered with the activities of persons performing services for the board, the only enforcement came after review of a

board order by the circuit court. And, as has been indicated above, some eighty-five per cent of all cases handled were settled without any formal action of the board. Certainly, the great majority of the work of the board was done without resort to force in order to bring about action that was in keeping with the policies laid down in the act.

There seems to be only one valid conclusion. The average employer in American industry objects to the organization of his workers in unions that are outside of his control. The objection is an understandable one. For if workers organize in a union, the next step is to demand joint determination of some matters that previously were determined by management alone. This means that "the right to manage" is being encroached upon, and such encroachment is quite likely to bring strong objection. It may be argued that this is an overstatement or that there are many employers who are quite willing to have their workers belong to unions. It is true that many employers no longer outwardly oppose union membership by their workers. Probably this is merely a matter of gradually accepting as inevitable that which was at one time effected by force.

It will be noted that where union membership no longer seems open to question, employers often insert in their agreements some clause concerning the right to manage. In such provisions they are attempting to draw a line beyond which a union may not go in demanding joint determination of conditions. Thus, the difference between the person who objects to unionism among his workers and the one who seeks to put into an agreement a clause saying "these are the prerogatives of management" is the line of resistance along which they are fighting. The person who opposes unionism *per se* is fighting along an outpost line of resistance, so to speak, while the other person has been forced to withdraw far enough to permit organization. The National Labor Relations Act coupled with the dynamism injected into the labor movement by the formation of the C.I.O. did much to speed such withdrawal.

Whatever the attitude toward the N.L.R.A., it was the law of the land during a hectic twelve years and, with many revisions, survived the postwar passage of the Taft-Hartley Law. Therefore, the interpretations by the courts and administrators of the meaning and applicability of the law are of interest and importance. This subject will be surveyed in the following chapter.

### Questions

1. What were the most important factors that kept Section 7 (a) of the N.I.R.A. from being an effective means of promoting union organization?

2. At the time that the National Labor Relations Act was passed how much judicial precedent was there in important labor cases for believing that the Supreme Court would hold it a valid exercise of the commerce power?
3. In view of the state of labor-management relations in the early 1930's, do you believe that the statement of unfair labor practices for employers only was defensible?
4. If you were charged with the task of determining an appropriate bargaining unit, what factors should you consider in making your decision?
5. What, in your opinion, were the most obvious weaknesses in the National Labor Relations Act?
6. Give a list of the activities which you believe were covered by each of the five unfair labor practices. What employer actions in the labor relations field were left untouched?

## CHAPTER XVII

### THE NATIONAL LABOR RELATIONS ACT (concluded)

#### Constitutionality of the act

The general purpose and provisions of the N.L.R.A. and some of the procedures used in applying the act have been noted. However, the very important question of the constitutionality of the act had to be answered before it became an effective part of the law of the land, since doubt as to its validity served as an excuse for widespread violations. In addition, there was the problem of building gradually a body of principles and doctrine to indicate the manner in which the provisions of the law would be applied in various circumstances. Both the constitutionality and application of the law merit careful attention.

The constitutionality of the law and the fact that it was applicable to a wide range of business enterprises were established in 1937 by five Supreme Court decisions handed down at the same time. These dealt with the application of the law to three different types and sizes of manufacturing concerns, an interstate news agency, and an interstate bus line. The ruling in four of the five decisions was by the narrowest possible division of the court, five to four. Probably the most important of these decisions was that which concerned the Jones and Laughlin Steel Company.<sup>1</sup> In this case the company had been accused by the Amalgamated Association of Iron, Steel and Tin Workers of America of an unfair labor practice; it was alleged that it had discriminated against certain of this union's members by discharging them. Following the procedures outlined in the foregoing chapter, the board investigated the charge and, after deciding that it was valid, issued a complaint. Later the board issued an order to the company directing it to cease and desist from the discrimination, to reinstate ten men with back pay, and to post notices that the company no longer would discriminate against members or prospective members. The company refused to obey the order.

As was noted in the preceding chapter, the board or a company could go to the Circuit Court of Appeals for enforcement of or relief

<sup>1</sup> *National Labor Relations Board v. Jones and Laughlin Steel Co.*, 301 U. S. 1 (1937).

from an order. In keeping with this provision, the board asked the Circuit Court of Appeals to enforce its order. The Court refused on the grounds that the order was beyond the range of federal power, since manufacture was not a part of commerce. From this ruling the board appealed to the Supreme Court.

Although the company denied to the board that discharge of the men was anti-union discrimination, maintaining that the dismissals were for inefficiency or infractions of rules, it contested the board in the courts on the basis of the constitutional validity of the act. It centered its argument on three points: (1) that the act was in reality a regulation of labor relations and not interstate commerce; (2) that the act could not be applied to production employees in the plant because they were not subject to federal control; and (3) that the act violated certain constitutional provisions, namely: Section 2 of Article III and the fifth and seventh amendments.<sup>2</sup>

The Supreme Court, in turn, did not weigh carefully the reasonableness of the discharges. This was merely good court practice, also specified by the law, which dictated that the Court accept the findings of fact of a body such as the board, unless they clearly were not supported by evidence. The Justices pointed out that the company, while criticizing the board's finding on the discharges, did not attempt to refute the board's position. They did state, in passing, however, that "the evidence supports the findings of the Board that respondent discharged these men because of their union activity and for the purpose of discouraging membership in the union." If that were the case, the next question was whether Congress could prohibit such discriminatory discharge of union men.

The issue on which the Court spent most of its time was that of exactly what power was conferred on the Congress by the interstate commerce clause; in other words, how far could the clause be stretched to permit regulation of matters not directly connected with the movement of goods over state lines. As the court majority pointed out, "The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several states' and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system." Very shortly thereafter the Court gave general approval to the act by saying, "We think it clear that the National Labor Relations Act may

<sup>2</sup> Section 2, Article III and the seventh amendment both provide for trial by jury in almost all cases; the fifth amendment violation was the usual accusation of taking property without due process of law.

be construed so as to operate within the sphere of constitutional authority." However, the issue remained for decision as to precisely what acts did affect commerce sufficiently to warrant federal control. It was declared a "familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power. Acts having that effect are not rendered immune because they grow out of labor disputes." No attempt was made to go beyond the rather loose wording herein and specifically indicate the circumstances under which an act would be a *direct* burden or obstruction on commerce. However, the Court did point out that it was the effect of an act upon commerce and not its nature nor the source of the injury that determined whether a certain act was to be subject to control by the federal Congress.

From this it is clear that the Court recognized the possibility of labor disputes becoming sufficiently burdensome to warrant federal control under the commerce power. But did a potential labor dispute in a steel mill have a sufficient connection to commerce to justify the National Labor Relations Act? In the Court's opinion, it did. In arriving at that conclusion, the Court reiterated its belief in the right of workers to organize, a time honored doctrine which existing practices frequently did not fit. And it was held that the guarantee that there be no interference with the selection of representatives was not a violation of constitutional rights but rather a recognition of the need to equalize the rights of both labor and management. "Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents."

There were various ways of looking at the question of the relationship to commerce of a labor dispute in the Jones and Laughlin plant. Was the manufacture of steel just one phase of a long movement of raw material from its original source, through a number of steps and processes and often across state lines, to the final consumer? Or was the manufacturing process sufficiently set aside and separable from the flow of commerce to warrant the position of the company that the activity of its workers was not affecting commerce? The Court previewed its conclusion by declaring:

"Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."



In spite of the fact that there was a delay in the movement of raw materials into finished products at the manufacturing site, where materials might be stored for months, it was held that a stoppage of operations at that site by industrial strife would have a serious effect on commerce. From this reasoning and numerous excursions into related fields the Court came to the conclusion, regarding the case at issue, that:

"instead of being beyond the pale, we think that it presents in a most striking way the close and intimate relation which a manufacturing industry may have to interstate commerce and we have no doubt that Congress had constitutional authority to safeguard the right of . . . employees to self-organization and freedom in the choice of representatives for collective bargaining."

There remained at least one other question to be considered by the Court. The company had asserted that rights guaranteed under the seventh amendment were denied to it. That amendment provides: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." The provision was held by the Court to be inapplicable in the case since it was not a suit at common law. Further, it was held inapplicable since the recovery of money damages was subordinate to the equitable relief which was sought; namely: the discontinuation of unfair and discriminatory labor practices.

Thus, on the basis of the reasoning outlined above, the majority stated its opinion that "the order of the Board was within its competency and . . . the act is valid as here applied." The case was remanded to the Circuit Court for action in conformity with the ruling. A milestone in Supreme Court rulings had been reached.

This same line of reasoning was used by the majority in two other cases attacking the validity of the N.L.R.A.; these opinions were delivered at the same time as the Jones and Laughlin decision. In one of the cases<sup>3</sup> the question was whether or not a relatively large manufacturing concern not possessing or controlling an integrated series of steps in production, such as sources of raw material, means of transportation, and so forth, was subject to the act. The Fruehauf Trailer Company owned a plant located in Michigan but purchased over half of its raw materials and sold over eighty per cent of its product outside the state; it was accused of discharging members of the auto workers' local employed in the plant. The N.L.R.B. found an unfair labor practice and ordered the company to cease and de-

<sup>3</sup> *National Labor Relations Board v. Fruehauf Trailer Co.*, 301 U. S. 49 (1937).

sist. On company refusal to observe the order, the board turned to the Circuit Court, which refused to enforce the board ruling.

The other case of the triumvirate concerned a clothing company;<sup>4</sup> the Friedman-Harry Marks Company was one of the fifty largest concerns of the 3000 that made up the men's clothing industry. Despite its relative size, the proportion of the production of men's clothing for which it was responsible was very small, perhaps one-half of one per cent. However, it obtained over ninety-nine per cent of its material from outside the state and sold about eighty-three per cent outside. The President of the company was strongly opposed to the activities of the Amalgamated Clothing Workers and threatened to fire anyone who joined the organization. Finding this to be an unfair labor practice, the board directed the company to cease and desist. Company refusal caused the board to appeal to the Circuit Court, which in this case again refused to enforce the ruling.

When these two cases were argued before the High Court, the points of objection were essentially the same as those of the attorneys for Jones and Laughlin except that violation of free speech was included for good measure. The majority simply reviewed the arguments of the parties and the situation surrounding both cases and then said that the Jones and Laughlin ruling applied. Neither the absence of an integrated series of steps in production nor the small part of the total industry production attributable to one plant was sufficiently important to differentiate the cases.

That the cases could not be distinguished was the one point on which the dissenters agreed with the majority; they issued one dissent applicable to all three cases. The dissent of four members of the Court, written by Mr. Justice McReynolds, was lengthy and diametrically opposed to the opinion of the Court majority. The crux of their dissent was that the matter regulated was not a part of interstate commerce. In the words of the dissenters, the power granted by Congress to the board "puts into the hands of the Board . . . control over purely local industry beyond anything heretofore deemed possible." In their opinion, the manufacturing of goods was a process separable from the movement of raw materials, much of it across state lines, which preceded the processing, and from the distribution and marketing which followed. With that concept in mind, the dissenters declared, "It is unreasonable and unprecedented to say the commerce clause confers upon Congress power to govern relations between employees and employers in these local activities." The minority admitted that labor unrest could indirectly affect the

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<sup>4</sup> *National Labor Relations Board v. Friedman-Harry Marks Clothing Co.*, 301 U. S. 58 (1937).

flow of goods in commerce, but they insisted that the relationship was much too remote to give Congress control over labor relations. Considerable space was devoted to stressing their idea that a direct and proximate relationship had to exist between an act and commerce before congressional control was warranted.

For added measure, the dissenters held that the National Labor Relations Act violated the freedom of contract provisions of the Constitution. As they put it:

"The right to contract is fundamental and includes the privilege of selecting those with whom one is willing to assume contractual relations. This right is unduly abridged by the Act now upheld. A private owner is deprived of power to manage his property by freely selecting those to whom his manufacturing operations are to be entrusted. We think this cannot lawfully be done in circumstances like those here disclosed."

The dissent is quite understandable from a technical point of view. It points up again, if there is any need for emphasis, the fact that decisions well-founded in judicial reasoning and legal precedents may equally well be out of step with the realities of economic life. Without question, the manufacturing operation is an intrastate process. But it is also unquestionable that the free and continued flow of goods in interstate commerce depends on the continuance of that intrastate activity without interruption. Interference with the manufacturing process will disrupt the flow of goods in commerce just as surely as would interference with the movement of a train, or truck, or barge, although the stoppage would not occur so quickly in the case of the manufacturing interruption. To argue that Congress can regulate only during the actual movement of goods is to argue that it cannot attempt preventive action to try to forestall interruptions that might occur later.

In the enactment of the anti-trust laws the Congress certainly had sought to control actions outside the stream of commerce because in the future they might affect the free flow of commerce. The N.L.R.A. was a sort of anti-trust law in reverse, based on the fact that a refusal to allow workers to join unions leads in many instances to unrest that would interfere with the production of goods.

The argument that the act violated the freedom of contract protected by the Constitution is an unconvincing one. It is true that employers were denied the right to discriminate in their employment practices against union members or prospective members. But such a restriction did not affect the many employers who had recognized and dealt with unions over many years. It was only those employers who were opposed to unions who had liberties taken from them.

In the absence of such a protective law the freedom of many workers to belong to unions if they so desired would have been denied. The denial would not have come from positive legislative enactments, but from the action of anti-union employers who were faced with no legislative requirement to maintain a hands-off attitude toward unions among their workers. In the past there had been cases galore to prove this point.<sup>5</sup> Should the liberty of employers who oppose unions or should that of workers who would like to join unions be protected? In the cases at hand two groups of Justices considered the question and came out with opposing answers, each with impressive lists of precedent cases to bolster its opinion. That which they could not find was a common basis of social and economic philosophy.

Two other cases testing the applicability of the N.L.R.A. were ruled upon at the same time as the three already described. Each of them presented different issues from those in the foregoing cases and must be noted separately. In one case the question was whether the act was controlling on an interstate news service.<sup>6</sup> The Associated Press had discharged one Morris Watson who was active in the American Newspaper Guild. The Guild in turn charged that the company was guilty of an unfair labor practice; after a hearing, the National Labor Relations Board found that such a practice existed and issued a cease and desist order. This the company refused to obey. The board carried the case to the Circuit Court, which supported the board and ordered observance. When the case was appealed to the Supreme Court, the company argued, beyond the arguments given in the other cases, that the act did not apply to the Associated Press because it was a creature of the newspapers and distributed news from all parts of the world to them. Since news was being distributed to member newspapers, it was argued that the exchange of news was not a sale. Further, it was argued that the application of the law to the Associated Press constituted a violation of the first amendment in that it denied freedom of the press. The reasoning back of this contention was that the law could require the retention of an employee who might color the news which he edited.

These arguments were not convincing to five members of the Court. Mr. Justice Roberts wrote the opinion; it was held that interstate communication of a business nature was interstate commerce and that therefore the N.L.R.A. did apply to the Associated Press.

<sup>5</sup> There are roughly fifty volumes of reports of *Senate Hearings on Violations of Free Speech and Rights of Labor*, conducted by ex-Senator LaFollette from 1936 to 1939, filled with such examples.

<sup>6</sup> *Associated Press v. National Labor Relations Board*, 301 U. S. 103 (1937).

As in the three preceding cases, the Court did not agree that the act took property arbitrarily and without due process of law. As to freedom of the press, the majority held that it was not violated; the act required neither the hiring of anyone nor the retention of an incompetent person or one who was biased in his editing of material that flowed across his desk. The prohibition of discrimination on the basis of union membership was not such as to require standards of efficiency or fairness to be dropped.

In summarizing the opinion of the Court, Mr. Justice Roberts said:

"The business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of the general laws. He has no special privilege to invade the rights and liberties of others. . . . The regulations here in question have no relation whatever to the impartial distribution of news."

Mr. Justice Sutherland dissented for himself and three other members. The gist of the dissent was that the application of the law to the Associated Press was a restriction on the freedom of the press. There was much talk in the opinion about the liberties of the people and the manner in which federal controls over these liberties could be extended if the N.L.R.A. were held valid in this instance.

Only one case<sup>7</sup> out of the five considered was decided without dissent. In this case the law was so clearly applicable and the decision added so little to the attitude of the Court that it may be dealt with summarily. The company, which ran busses from Washington, D. C., into suburban areas in Virginia and Maryland, did not argue, as had the other four contestants, that they were not engaged in interstate commerce. However, they argued that the law attempted to regulate all employment whether interstate or not and, as this was unconstitutional, the law had to fall. If the law were unconstitutional, then it could not apply in their case regardless of the fact that their employment was in interstate commerce. Since we have noted the earlier decisions applying the law to other types of business, it is clear that the Court would hold the law applicable to the coach company. This they did by a unanimous decision upholding the Circuit Court of Appeals.

#### Application of the law: coverage

Thus the constitutionality and general applicability of the act was established. But with any law there is the task of building a body

<sup>7</sup> *Washington, Virginia and Maryland Coach Co. v. National Labor Relations Board*, 301 U. S. 142 (1937).

of doctrine that delimits the applicability of the law and clarifies the meaning of provisions that may be rather vague. In legislation as controversial as the N.L.R.A. such a body of doctrine is of especial importance. The National Labor Relations Board has been engaged for a number of years in rendering decisions from which their doctrines can be drawn. It is necessary to examine the principles laid down.

Perhaps the first matter to be noted is the coverage of the law. The five original court decisions on it sanctioned very broad coverage, but many questions still remained as to exactly what employees were included.<sup>8</sup> As the Friedman-Harry Marks case showed, the relative amount of goods shipped in commerce was not controlling; neither was the fact that all of a good was sold within a state necessarily controlling. An electric company whose power was sold within the state to customers engaged in commerce was held included, as were cloth manufacturers selling within the state goods that later crossed state lines. In still another instance, a concern largely engaged in purely intrastate commerce, but with a part of the company engaged in commerce was held subject to the act.<sup>9</sup>

The board has held that whoever controls the labor policies of a concern is considered an employer. This was true of employer's associations; however, if it could be shown that such an association was not authorized, such a finding would not be made.

In some instances, a company leases out some or all of its work to independent contractors. In cases of that nature where the subcontracting appeared to be an attempt to escape the provisions of the act, the company has been held responsible as the employer. But where sufficient independence was allowed in the operations of the contractor and his employment policies, the contractor was held to be the person to whom the law applied. In a similar vein, there have been cases when two or more concerns, jointly operating some business or facility, were held responsible for unfair labor practices. An example would be a mining operation carried on by one concern on land jointly owned by several.

Since the act defined an employer so as to include persons acting in the interest of an employer, questions frequently arose as to the persons thus included. The board went rather far afield in some of these issues. The wife of a foreman, herself not employed by the company but actively opposing unionization of employees, was held

<sup>8</sup> For a brief but very good survey of the coverage of the act see: Millis, H. A., and Montgomery, R. E., *op. cit.*, Vol. III, pp. 524-528. See also: *Prentice-Hall Labor Course*. For a more extensive presentation of information on this subject with citations of relevant board decisions see: *Prentice-Hall's Complete Labor Equipment*, Vol. 2, *Labor Relations*.

<sup>9</sup> *Virginia Electric and Power Company v. National Labor Relations Board*, 314 U. S. 469 (1941).

to come under the definition of an employer subject to the act. Similarly, a person who gave much financial aid to a company and who had much influence on the business and its labor policies was held to be an employer for purposes of the act, even though he held no office in the company. On the other hand, a chamber of commerce that took part in a labor dispute independently and not at the request of the employer was not held to come under the definition included in the act.

The definition of an employer excluded the United States and the states and their political subdivisions; that exclusion has raised a number of questions in its application. For example, was the private operator of a governmentally owned vessel exempt from the act? The board ruled in the negative. A mail transportation company working under government contract whose employees were subject to dismissal at the discretion of the Postmaster General was ruled subject to the act. On the other hand, a state commission established to acquire, construct, maintain, and operate harbors was ruled to be exempt from the act. A national bank, chartered under federal rules and a member of the Federal Reserve System and the Federal Deposit Insurance Corporation, was held to be subject to the act. The relationships to the federal government did not detract from the fact that the bank was a private business enterprise.

The term employee as used in the act was almost as difficult to define. Except for excluded agricultural and domestic workers the coverage was very broad; professional workers, minor supervisory workers, maritime employees, white collar workers, temporary workers, and persons who had been discriminatorily discharged all were employees.<sup>10</sup> The exclusion of agricultural workers was construed rather narrowly to include persons cultivating the soil, harvesting crops, and rearing and managing livestock. Under such a principle, fruit pickers, nursery workers, and hatchery workers were excluded from coverage. Persons engaged in the packing of agricultural products were included, as were persons working in greenhouses, and so forth. Persons out on strike or out of work because of a labor dispute retained their status as employees, except that sit-down strikers and those striking in breach of contract or demanding wage increases in violation of wartime controls were not protected.<sup>11</sup>

<sup>10</sup> Prentice-Hall's *Complete Labor Equipment*, Vol. 2, *Labor Relations*.

<sup>11</sup> The Supreme Court ruled in the case of *Fansteel Metallurgical Corporation v. National Labor Relations Board*, 306 U. S. 240 (1939), that persons discharged as a result of a sit-down strike were no longer employees. The Court so ruled because in its opinion a sit-down strike "was not the exercise of 'the right to strike' to which the Act referred. It was not a mere quitting of work. . . . It was an illegal seizure. . . . When the employees resorted to that sort of compulsion they took a position outside the protection of the Statute. . . ."

## Application of the act: unfair labor practices

It will be remembered that Section 8 of the act prohibited to employers five unfair labor practices. In brief these were: (1) to interfere with the right to join a union; (2) to dominate or influence a union of the employees; (3) to discriminate in hiring or tenure on the basis of union membership; (4) to discriminate against an employee for filing charges under the act; and (5) to refuse to bargain collectively with designated representatives of the workers. On all these questions, the national board had to handle the problem cases after the regional or field representatives held hearings and recommended or directed certain action. But any case that was significant and unprecedented was reviewed by the national board, and any such contest was between that board and the employer who objected to the directive or finding. Rulings of the board in these contested cases that illuminated the meaning of the proscribed activities are of interest.

On the first prohibition, against interference, restraint, or coercion of employees exercising their right to join a union, a large body of doctrine has been built. Clearly discriminatory discharge, black-listing, demotion, threat of removal of a plant, offers of bonuses to loyal employees, bribes, threats of bodily harm, and so on were unfair labor practices and were so held. So were the use of strike-breakers and the vilification of a union or its members. Hiring of industrial spies and the watching of union meetings or of the polling places at the time of an election were also unfair practices. What an employer could say or do without violating the law was not easily determined and would not be the same from place to place and time to time. For example, an employer who had a small, relatively easily moved clothing business in a town with little other employment and an anti-union attitude on the part of the public could, by expressing a doubt that he could continue in business if his workers unionized, have a strong influence on his employees' attitudes. On the other hand, in a union center such as Detroit and with a plant that was nearly immovable a similar statement would have had little effect. Generally, where there was no tradition of anti-unionism and if an employer merely stated desires without threatening dire results if a union was chosen, the employer was permitted to make his wishes known.<sup>12</sup> Certainly his freedom of speech was not absolute, since the economic power he held over his workers was great;

<sup>12</sup> *Prentice-Hall Labor Course*. This statement agrees with the unpublished comments of one of the regional directors of the National Labor Relations Board who observed that it was not so much the giving of a preference as the intimidating threats of dire results of certain choices that would be prohibited.



but he could appeal to the courts if his real freedom of speech was unreasonably restricted. There was a certain area of discretion in which the board was forced to balance the right of free speech against the coercive efforts which an employer's comments might have on his workers.

There was another difficult question that arose in connection with allegations of coercion. That was the problem of the responsibility of employers for the behavior of their supervisors. Generally, if the supervisor acted within the scope of his authority, the employer was responsible. In one case, the board held, and was supported by the Supreme Court, that lead men could be held to express the employer's viewpoint even though not directly authorized to do so. As the Court viewed the question, "The employer . . . may be held to have assisted the formation of a union even though the acts of the so-called agents were not expressly authorized or might not be attributable to him on strict application of the rules of *respondeat superior*."<sup>13</sup>

Section 8 (2) prohibited domination of, interference with, or contributions to a union. This was not a prohibition against small local unions; a union could be limited in its membership to the employees of one company and still be a legitimate organization, but the probability of this was not great. The following are acts that generally were thought to be indicative of an attempt at domination and therefore an unfair labor practice. Payment by the company of the wages of a union official spending all his time on union matters was an indication of employer control, as were special concessions such as providing a meeting place on company property, allowing use of company equipment, and the like. The hasty recognition of a union or the recognition of one that was only company-wide when another union was trying to organize a plant was likely to be interpreted as an indication of an unfair labor practice.<sup>14</sup> Generally, any evidence of financial aid, of urging by employers or their representatives of one union over another, or of granting special favors to any one union was looked upon as an indication of domination.<sup>15</sup>

It is important to note that the discrimination in hire, tenure, or employment conditions proscribed by Section 8 (3) did not prohibit or limit the ability of the employer to dismiss incompetents or to promote deserving workers who qualified for promotion under rules

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<sup>13</sup> *International Association of Machinists, Tool and Die Makers Lodge No. 35 v. National Labor Relations Board*, 311 U. S. 72 (1940).

<sup>14</sup> See: *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350 (1939).

<sup>15</sup> See *Prentice-Hall Labor Course* for a summary of activities prohibited and allowed.

that were applicable to all persons employed within the plant regardless of union affiliations. Discharge or threatened discharge because of union membership was clearly prohibited by the section and was held illegal by the Supreme Court.<sup>16</sup> Similarly, demotion of a union man in violation of his seniority rights or without regard for his proven skill was interpreted as discriminatory. The same ruling was made in cases of refusal either to reinstate a laid-off union man or to hire qualified applicants because of union membership. In deciding on whether there was discrimination, the board considered the following: the company's stated reason for action against an employee; whether the employer took similar action against other workers; whether the worker was warned of forthcoming company action; whether the company knew of the union status of the employee; the employee's record on efficiency ratings, promotions, and the like; and the attitude of the company toward unions.<sup>17</sup>

Section 8 (4) forbade discharge of or discrimination against a worker who filed charges; since the central issue here was again the matter of discrimination, no new problem was introduced. Section 8 (5) was not so easily disposed of; the dilemma of when that provision was being observed adequately was indeed a complex one. This section made it an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his workers. Actually, more was involved than the words imply, for it was one thing to go through the motions of bargaining collectively and quite another actually to bargain in good faith. The matter of bargaining in good faith was the crux of the problem. Following are some types of action that clearly were prohibited if an employer was to be considered as exhibiting good faith in bargaining: refusing to meet or negotiate with properly chosen representatives of an appropriate bargaining unit, even though the representatives might not be employees; trying to weaken the union position by changing working conditions during negotiations; rejecting union proposals without submitting management's basis of settlement; refusing to put an agreement into writing and sign it; refusing or failing to name representatives with sufficient authority to reach an agreement and/or to make them available for conference at reasonable times and places.<sup>18</sup> Unless there were extenuating circumstances, the employer was required to bargain even though his workers were on strike. Even if the negotiators were reinstated strikers, the obliga-

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<sup>16</sup> *National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261 (1938).

<sup>17</sup> Division of Labor Standards, U. S. Department of Labor, Bulletin No. 81, *A Guide to the National Labor Relations Act*, p. 5.

<sup>18</sup> *Ibid.*, pp. 5-6.

tion remained.<sup>10</sup> One other point should be kept in mind; the act of 1935 imposed no obligations upon unions, and an employer was not allowed to use unfair statements by union leaders as an excuse for refusing to bargain collectively.

In addition to the above unfair labor practices that could be derived from the various prohibitions, a number of further observations on employer practice may be helpful. Management was allowed to make plant rules concerning union activity when that activity occurred during working time paid for by the employer, but such a ban could not extend to rest periods, lunch time, and similar hours. If the worker lived on company property, the ban of the employer could not extend to the employee's time at home. Further, an employer might not question a prospective worker about his union affiliations or require such information on application blanks. Nor could an employer use outside groups such as citizens' committees for anti-union activities.

Closed shop and union shop provisions presented additional problems. While these provisions are only of historical interest under the current provisions of the Taft-Hartley Law, they are worth noting. Specific provision was made in the old law that agreements requiring union membership as a condition of employment were permissible. However, two conditions had to be met by such agreements: the union with an agreement had to be non-company dominated and chosen by a majority of the employees voting in an appropriate bargaining unit. Failure to meet these requirements would result in dissolution of the contract. Such an agreement could not be entered upon when a question of majority representation was pending before the board. Workers could not be discharged pursuant to a closed shop agreement if they were never informed of the existence of the pact or if the union refused them membership because of activities in behalf of another union.

Another matter of historical interest is whether foremen could organize for collective bargaining. Employers naturally opposed the idea on the basis that foremen were their representatives and therefore should not be a part of a labor organization. The national board issued different opinions on the problem. By 1946 its attitude seemed to be rather clearly in favor of allowing foremen to join unions. If the membership of the organization was limited to foremen only, members were entitled to board protection of their right to organize. However, if the foremen were members of the same union as the men they directed, the company could insist that they not use their position to further the cause of the union, and it

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<sup>10</sup> See Prentice-Hall's *Complete Labor Equipment*, Vol. 2, *Labor Relations*.

could remove a foreman to a non-supervisory job if he refused to observe such a request. Altogether, the position of foremen under the act was not a clear and adequately defined one.<sup>20</sup>

### Application of the act: the bargaining unit

Another complex question other than that of what labor practices were unfair appeared frequently. This involved the necessity of determining what was an appropriate bargaining unit. Should the craft, the plant, the company, the industry, or a geographical area be the appropriate unit for collective bargaining? On many occasions an employer was faced with two or more unions insisting that they represented the workers or some segment of them. How was the proper union to be selected? It was the job of the National Labor Relations Board to give answers to both of these questions.

Although the bargaining units selected varied widely from one case to another, the board took certain factors into consideration when naming the appropriate unit. The proposed units were examined in the light of:

"(1) the history, extent, and type of organization of the employees in the plant; (2) the history of their collective bargaining, including any contracts with their employer; (3) the history, extent, and type of organization, and the collective bargaining, of employees in other plants of the same employer, or of other employers in the same industry; (4) the skill, wages, work and working conditions of the employees; (5) the desires of the employees; (6) the eligibility of the employees for membership in the union or unions involved in the proceedings and in other labor organizations; and (7) the relationship between the unit or units proposed and the employer's organization, management and operation of the plant."<sup>21</sup>

It may readily be seen that a proposed bargaining unit might not appear favorably in the light of all the points listed above. On the basis of such a list of criteria, quite different units could be designated in one case as compared with another. It was said that "The Board tries to join in a single unit only such employees and all such employees as have a mutual interest in the objects of collective bargaining."<sup>22</sup> This principle was very difficult of application. Obviously, the smaller and more closely knit a group, the more interests

<sup>20</sup> The Jones and Laughlin case, 66 N.L.R.B. 51 (1946), is a recent example of the tendency to designate foremen and supervisors as a separate bargaining unit. A similar practice was common for technical and professional workers, watchmen, office and clerical workers, and similar special groups. Board orders commonly separated these groups from the production workers.

<sup>21</sup> *Prentice-Hall Labor Course*.

<sup>22</sup> *Ibid.*

its members will have in common. But this guide could not be followed too closely, for matters of eligibility for union membership or the organization of other plants in a company or industry might override the inclination to choose the units in which the greatest mutual interests were present. It seemed logical, therefore, to expect that a variety of opinions as to appropriate bargaining units would be handed down. This is exactly what happened.

In the matter of Globe Machine and Stamping Company<sup>23</sup> the board had to determine whether a craft or industrial unit was appropriate. The unions affiliated with the A. F. of L. insisted that appropriate units required a craftwise split-up of the employees of the Globe Company, whereas the United Automobile Workers, C.I.O., urged that the entire plant was the proper unit. The board actually side-stepped the issue by saying that either unit was appropriate and that an election among the craft workers should be considered as determining. Later, in the matter of Allis-Chalmers Manufacturing Company,<sup>24</sup> the board saw fit to exclude draftsmen and technical engineers from the plant-wide unit and to state that firemen, oilers, and maintenance electricians could if they so desired be considered as separate appropriate units.

On the other hand, the board designated a company-wide unit in the Libbey-Owens-Ford Glass Company Case.<sup>25</sup> In compliance with the demands of the Federation of Flat Glass Makers of America, C.I.O., the board decided that all the plants of the company should be included in one unit.<sup>26</sup> In another instance a still more broad bargaining unit was named. In the Shipowners' Association of the Pacific Coast case<sup>27</sup> the entire Pacific coast area was named as one unit for bargaining with respect to all longshoring activity. This decision was in keeping with the stand taken by the International Longshoremen's and Warehousemen's Union of the C.I.O.<sup>28</sup>

From these examples it is clear that the criteria listed by the board as guides for determining appropriate bargaining units were so applied as to yield a wide variety of decisions. The inclination to

<sup>23</sup> 3 N.L.R.B. 294 (1937).

<sup>24</sup> 4 N.L.R.B. 159 (1937).

<sup>25</sup> 10 N.L.R.B. 1470 (1939).

<sup>26</sup> This ruling was partially reversed in 31 N.L.R.B. 38 (1941) when the board excluded one plant, that in Parkersburg, W. Va., from the previously designated unit on the grounds that the Federation of Flat Glass Workers had failed to organize the plant in the two years that had elapsed.

<sup>27</sup> 7 N.L.R.B. 1002 (1938).

<sup>28</sup> This designation also was modified at a later date. In 32 N.L.R.B. 668 (1941) three ports in the Puget Sound area were removed from the previously designated unit on the grounds that the union had not organized those ports after the 1938 designation was made.

allow employee wishes to weigh strongly was found in many instances after the Globe doctrine was laid down. The scope of prior contracts and the eligibility of workers for membership in a union representing the unit also were important factors. The failure of a union to organize workers in some part of a specified unit led in some instances to a modification in the original designation. The Taft-Hartley Act was so drawn that widespread redesignation of appropriate bargaining units probably will result.

#### The effects of the N.L.R.A.

The National Labor Relations Act was on the statute books without revision for a period of twelve years. Since its constitutionality was established at the end of about two years, there was a decade in which it was administered with little question as to its legality. Its effects during this period are difficult to appraise since so many dynamic economic trends were in motion at the same time. One effect is rather clearly traceable to the act; the attempt to administer it in such a way as to protect effectively the right to organize brought a strong and concerted effort to undermine the law and to revise or repeal it. With a less forthright administration or a less dynamic labor movement, the drive to realize the purposes of the act would have lost much of its force.

One of the events of the period that makes it difficult to evaluate the act is the growth of the Congress of Industrial Organizations. Not only was this grouping of unions a dynamic and driving one, but it gave the American Federation of Labor sufficient competition that the latter showed more activity than it had in a score of years. This enlivened labor movement brought an enormous increase in the number of workers in unions, from about 4,000,000 in 1935 to nearly 15,000,000 in 1946. There is no doubt but that the greater drive of the unions was in good part responsible for the growth in their membership; but it also seems clear that the N.L.R.A. gradually brought a more receptive attitude on the part of employers toward unionization of their workers, and that it also encouraged the growth in the size and power of unions.

An indication of the change in attitude that developed was the types of cases handled by the board. In 1936 unfair labor practice cases, accusations that the employer refused to allow his workers free choice in deciding whether they wished to join a union, accounted for eighty-one per cent of the cases filed with the board, whereas nineteen per cent represented requests for selection of the proper bargaining representatives. Ten years later the figures were almost reversed, with 75.1 per cent of the cases filed in 1946 being representation cases and 24.9 per cent alleging unfair labor practice.

This shift seemed to indicate that more and more employers were beginning to accept the idea that allowing workers to join a union was not catastrophic. Of course some of the shift was due to the fact that during the war years the average employer was so interested in keeping his production rolling that he was not inclined to run the risk of strong union opposition. In addition, if such a case were carried to a government dispute-settling agency for solution, it was likely that the union-opposing employer would lose his case.

There is another probable effect of the law that cannot be proven and will not be an acceptable point to many. Probably labor relations improved greatly under the law; the increasing proportion of representation cases before the board was an indication of this. Even more indicative was the large number of agreements that existed between labor and management that were renewed year after year without publicity and fanfare. The Bureau of Labor Statistics estimated in 1947 that the number of union agreements in the country was "substantially in excess of 50,000" and "that 50,000 or more agreements are rewritten in whole, or in part, each year."<sup>29</sup> In 1946, twelve months during which we experienced more labor disputes than in any other year, there were 4985 work stoppages arising from disputes. In this peak year of our history, as far as labor disputes are concerned, there were probably nine labor-management agreements revised or renewed peacefully for every one that broke into a work stoppage, an impressive and unpublicized record.

It may be urged that this record was compiled in spite of and not because of the N.L.R.A.; although a complete cause and effect relationship cannot be shown, it is clear that some of the credit is due the board. When management and union representatives work out an agreement in good faith and with no mental reservations, they lessen the chance of misunderstandings that might arise to disrupt day-to-day relationships. A union agreement is simply the predetermination of the most common controversial issues in labor-management relations and of a general method to be followed in resolving disagreements that may arise over these or other issues. Once these points are agreed upon and reduced to writing, the likelihood of misunderstandings that reach the work stoppage stage is greatly reduced.

If the preceding paragraph is correct, it follows that a measure which encourages the growth of *bona fide* unions is to be commended; more unions mean more trade agreements and more agreements mean more cases in which management and labor know what

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<sup>29</sup> "Work Stoppages Caused by Labor-Management Disputes in 1946." *Monthly Labor Review*, May, 1947, Vol. 64, No. 5, pp. 780-800.

their rights and duties are. The agreements are important primarily because of the order which they introduce into the settlement of grievances and misunderstandings that might otherwise develop into work stoppages. The publicity given labor disputes to which a union is a party gives a very misleading picture of the day-to-day role of the average union, in which the prompt settlement of small but potentially important and disruptive grievances is the backbone of the job to be done.

The opinion is expressed here that the N.L.R.A. had a salutary effect on labor relations, but this opinion is not a widely accepted one among non-working groups. The law was subjected to much criticism from the very first and many proposed amendments were introduced in every session of Congress.<sup>30</sup> It was attacked especially on the grounds that it denied to employers the freedom of speech guaranteed to them by the Constitution. The difficulty of balancing free speech against the coercive effects of employers' statements has already been noted. The attackers also insisted that the administrators were biased in their application of the law. On this point, it is doubtful if there was as much bias as there was an attempt to administer the law as written. The law was drafted to ensure certain rights of workers and was not a balanced piece of legislation treating all parties alike.

Objections also have been raised that the board acted as both judge and prosecutor. These were based on the fact that representatives of the board determined what cases it would hear, with the parties concerned allowed to present arguments, and, once that decision was made, the board then sat to decide on the case. It was argued that a bias was certain to exist where the board reviewed the action of one of its trial examiners.

Still another objection to the law was the fact that it contained no specification of duties or responsibilities for unions and no rights for employers. This is indeed true, but it does not seem to recognize the very nature of any piece of legislation. Any law, recognizing a certain maladjustment or abuse that needs correction, proceeds to lay down rules that will, it is hoped, remedy the situation. When the act was passed, at the time of a weak labor movement in the United States and concerted anti-union opposition, it was clear that some governmental action was necessary if the right to join a union were to become a reality for many workers. Thus, the law was passed as a measure to remedy one situation and did not

<sup>30</sup> For a survey of proposed changes see: Millis, H. A., and Montgomery, R. E., *op. cit.*, Vol. III, pp. 534-549. For a somewhat unsympathetic evaluation of the law see: Metz, H. W., *Labor Policy of the Federal Government*, pp. 104-114. Washington, D. C.: The Brookings Institution, 1945.



look forward to the time when the union movement had tripled in size and the economic situation gave unions much more power. The purpose was to adjust an existing imbalance; as the imbalance lessened the law fit the situation more poorly.

Meanwhile, the labor unions did little to help the situation. As unions grew by leaps and bounds it became clear that effective, responsible, intelligent leadership did not grow equally rapidly. Many of the disputes that occurred during and especially after the war were ill-advised, and more and more persons developed the attitude that John Q. Public was helplessly caught in the fight between unions and employees so that regardless of which party won the battle, John lost. And with this feeling many people held the erroneous opinion that the N.L.R.A. that encouraged the growth of unions was responsible for the unrest and trouble. In reality, the situation was built up by economic forces outside the control of any one individual or group. A major war seems inevitably to leave a legacy of economic disruption and widespread unrest.

Although the N.L.R.A. was not directly responsible for the post-war actions of unions, the law had encouraged their rapid growth, and some of these actions were not wise. The issues involved in some stoppages were relatively minor, especially in comparison to the duration of the dispute. And unless an item was significant, prolonged stoppages to force the concession were unwise in that they added to the nation-wide anti-union sentiment. A further ill-advised act of many unions was the unconditional opposition to any revisions of the Wagner Act.

It would have been wise for the two major federations of unions, the A. F. of L. and the C.I.O., to have proposed and tried to lobby-through certain amendments to the N.L.R.A. Essentially, these should have stipulated a number of unfair practices for unions, such as failing to bargain collectively, certain make-work policies, carefully delimited coercive action against workers or employers, racial discrimination in membership policies, and the closed shop. When employers clearly held the upper hand, their labor practices were rightfully restricted; when the powers of numerous unions grew to match those of employers, it was time that their actions also should have been subject to certain rules that would have tended to bring them in line with public interest.

Union leaders did not choose such a line of action. The Wagner Act, as passed, was satisfactory to them; they wanted no change, other than the desire of the A. F. of L. to see the law or its administration modified so as to give more preference to craft unions. In a sense, this attitude showed a lack of vision and an unwillingness to accept responsibility. It is true that most unions were anxious to

bargain collectively and were willing to make reasonable compromises, but this was not always true. However, a minority of unions would have felt the pinch of restrictions such as those outlined in the preceding paragraph and they should not have been protected. Failure to take such self-restricting action paved the way for a revision which every union, the stable and responsible as well as the others, was to feel.

When postwar opposition to the Wagner Act finally crystallized in the Taft-Hartley Law, the proposed changes were so sweeping that every union had little choice but to oppose the law in its entirety. Of course, as enacted, the Taft-Hartley Law<sup>31</sup> contained provisions other than those revising the Wagner Law. It cannot be said definitely, therefore, that a mild revision of the N.L.R.A. would have been sufficient to stave off the much more sweeping law that was passed. However, such a move, if taken near the end of the war, would have prevented some of the irresponsible action that was so highly publicized in 1946 and 1947 and would have made for less severe attitudes. A more moderate revision that spelled out unfair labor practices for unions, once it became a part of the law, would have lessened the effectiveness of the move for a sweeping revision.

### Questions

1. In your opinion, is there any one clearly definable limit to the extension of the interstate commerce power? Why or why not?
2. What relationship did the N.L.R.A. have to the number and severity of labor-management disputes? Defend your opinion with all the data you can muster.
3. To what extent did the ruling of the majority of the Supreme Court in the Jones and Laughlin and other cases bear out earlier dissents by the liberal minority of previous courts? What Justices and decisions do you have in mind?
4. What are the pros and cons in the issue of whether foremen should be allowed to organize? What were the fluctuations of board opinion on this question?
5. In the case involving the Fansteel Metallurgical Corporation the Supreme Court was sharply critical of the sit-down strike. In your opinion, is there a sharp and clear basic distinction between the sit-down strike and the walk-out? Why or why not?
6. Was the action of organized labor under the N.L.R.A. generally wise and reasonable or was unfair advantage taken? Defend your answer with citation of as many specific instances as possible.

<sup>31</sup> Discussed in Ch. XXV.

## CHAPTER XVIII

### SOCIAL SECURITY: GOVERNMENT ACTION AGAINST UNEMPLOYMENT

#### The need for a social security program

We come now to another area of government action that is of great significance to workers and their families. As a general proposition, however, both state and federal governments have been reluctant to enact laws that put them in the position of underwriting the economic security, or some minimum degree of it, of worker groups. However, the growth of our present-day economy brought with it more and more economic insecurities; these risks and the examples of European nations in their attempt to cope with similar insecurities made it necessary to take some action in this country.<sup>1</sup>

It would not be wise to argue that our modern economy is a more insecure one than we have had in the past; the truth or falsity of such a proposition would be most difficult to prove. However, the insecurities of the past were to a greater extent the result of factors that were completely or largely outside the control of men. A drought or famine or wave of illness could not be laid at the door of the behavior or misbehavior of individuals or of the economy. The maladjustments experienced periodically today, in which there may be idle men, machines, and raw material and a need for products but still no jobs available, were not often found until the modern mass-production economy developed; nor were the situations in which older persons were so obviously unneeded present in the economy.

In still another particular, insecurities of the past were not so complex as are those of the average worker today. A farmer or farm laborer was one who made a living rather than one who earned money. The further one moves back toward colonial times, the larger the farm portion of our economy and the greater the portion of their essentials for living which they produced for themselves. Most of the food and much of the clothing, household goods, and

<sup>1</sup> The insecurities of unemployment, old age, and the lack of income of the needy trailed the enactment of workmen's compensation laws in most states. In a broad concept of social security workmen's compensation should be included. However, those laws are not included here since they were some of the earliest developments of modern labor legislation. See Ch. X.

other equipment was self-provided. Under those conditions, the ability to provide food, clothing, and shelter for one's family or dependent parents was to a greater extent within the control of the individual. In the present-day economy, with a much larger proportion of employees and smaller proportion of self- or family-employed persons, procuring a living is more roundabout and less under the control of the individual. Most workers today produce but a small portion of the goods and services that they consume; rather they work for an income, and with that income, derived from doing one specialized job, they purchase the goods and services on which they live. The key to security, therefore, for the modern wage earner is a continuing wage adequate to meet or exceed his needs for the necessities and comforts of life. Current social security programs center on government provision of a minimum income for those unable to earn one owing to old age, unemployment, physical disability, or other condition not within their control.

There has been much discussion of the point that social security benefits are a threat to the maintenance of an incentive to work.<sup>2</sup> The general thought seems to be that the threat of hunger and hardship must hang like the sword of Damocles over the average worker's head before he will do his best. This philosophy was part of the keen individualism that characterized our thinking at least up to the end of the nineteenth century. Events of the twentieth century, especially the depression of the 1930's, have gradually shaken somewhat the universal faith in individualism; but it is still far from dead, and perhaps fortunately, since a considerable degree of individualism is to be desired as long as it does not become a fetish.

While it may be argued that incentive and individual initiative are basic to our economy, it does not follow that insecurity is the best means of providing that incentive. The experiences of the second quarter of the twentieth century proved that there simply is not enough demand for goods and services to provide jobs for all those who want work year in and year out. Therefore, all the incentive imaginable will not be enough to provide steady jobs for all. And insecurity of job and income may discourage efficiency rather than encourage it. The advice, "Don't work yourself out of a job," is frequently given by one worker to another. Set amounts of production per hour or day are not uncommon. The fear of losing a job may well lead to stretching out the work and to playing politics to assure continued employment rather than to putting more

<sup>2</sup> For examples of this point of view see: *Social Security*, a Statement by the Social Security Committees of the American Life Convention, Life Insurance Association of America, and The National Association of Life Underwriters, scattered passages. Chicago: February, 1945.

and more faith in efficient workmanship. The belief that insecurity ensures efficient workmanship is not easily proven—or disproven, for that matter.

### The uncertainty of steady employment

Unemployment is the basic type of economic insecurity in our economy; it ramifies into many other common types of insecurity. For example, even though the association is not commonly made, there is a direct relationship between the amount of unemployment and the extent of the problem of dependent old age and the dependence of handicapped and inefficient workers on public assistance. This relationship comes largely from the effect which the amount of employment has on standards of employability. Generally speaking, when there is a considerable reserve of unemployed labor, an employer or his hiring representative sees first the inabilities or defects in an applicant. But under the pressure of a short labor supply, employment officials begin to look for the abilities of the applicant; in other words, the question in this situation becomes one of what the job seeker can be used for with careful and proper placement designed to take advantage of whatever ability the person has. Thus it may develop that age, physical handicaps, limited mentality, and the like no longer stand as a bar to employment, especially with pre-job training to provide new skills or techniques.

For most unskilled and semi-skilled jobs, older persons, the blind, and the otherwise handicapped are the least desirable workers. Consequently, they most quickly become submarginal as employment qualifications are raised and are the last to become intramarginal as qualifications are lowered.<sup>3</sup> There is, consequently, a clear relationship between the amount of unemployment and the ability of less desirable groups to get jobs. The experience during World War II when the whole group of social security problems became less severe is proof of the point that the will-o'-the-wisp full employment is the best answer of all for many of our social security problems.<sup>4</sup>

<sup>3</sup> It is recognized that realistically a worker does not become submarginal or intramarginal in all jobs of any employer or for all employers at the same time. However, this fact does not destroy the validity of the general position stated, see: Miller, G. W., "Unemployment and Unemployability," *The American Journal of Economics and Sociology*, July, 1948, Vol. 7, No. 4, pp. 429-438.

<sup>4</sup> Even if relatively full employment could be maintained year in and year out, a very doubtful condition, there would still be economic insecurities that would have to be met. Some persons are not able to work: the severely handicapped, some of the aged and infirm, and widows with small children are examples. Full employment would never take care of all uncertainties and of all classes of people. Some need of public assistance and other social security programs would continue.

Not only is unemployment important for its influence on various security problems, it is important of its own accord. There have been times in our history when there was no work available for millions of people who could not be classified under any reasonable standard as marginal. Proof of this fact is of relatively recent origin. Unemployment did not show itself as a serious long-run problem until after the first World War; it was not widely recognized as important until after 1930. Then the improvements in efficiency born of the war and postwar period began to catch up with us. We found ourselves as a nation in the tragi-comic situation of being able to produce goods and services in excess of the effective demand for them. Thus, during the 1930's the nation as a whole averaged perhaps 10,000,000 persons unable to find work out of a labor force of about 50,000,000 persons.<sup>5</sup> During a number of years the tally of those out of work was well over 10,000,000. A person out of work means a person without an income; sooner or later savings or other reserves will be exhausted and, in a civilized society, some relief in the form of money or goods must be provided. When the burden of unemployment became so heavy, in the 1930's in particular, persons began to look for the causes of the situation.

In bare outline, the basic causes of the unemployment were not hard to find. For a decade we had been able to produce more goods than we found it feasible to distribute. Although increased ability to produce would seem to be highly desirable, in our own economy it has resulted in a most complex problem. On the basis of the third of a century following World War I, it seems that we are unable to distribute the output of full employment for very long except when engaged in war or in replacing the shortages induced by war.<sup>6</sup> Thus, except for war and brief postwar periods, it is clearly demonstrable that a sizable amount of unemployment is likely to plague us at most times, although more seriously at some times than at others.

Once layoffs begin in one firm, as a result of a lack of economic demand for the product of full-time work, unemployment begins to spread. The economic disturbances are somewhat comparable to

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<sup>5</sup> The Bureau of the Census issues reports on the labor force and the employed every ten years. Other less broadly based studies are made more frequently. In addition, employer and union groups, such as the National Industrial Conference Board and the American Federation of Labor, maintain estimates of the amount of unemployment.

<sup>6</sup> Explanations of this inability to distribute vary widely from traditional or orthodox economists to those supporting the Keynesian type of theory. For a stimulating presentation of the latter approach see: Dillard, Dudley, *The Economics of John Maynard Keynes*. New York: Prentice-Hall, Inc., 1948; Hayes, H. Gordon, *Spending, Saving, and Employment*. New York: Alfred A. Knopf, 1945.

the disturbances on the surface of a pool of water into which a stone is dropped. Persons who are laid off because of excess inventories of some good on which they work will soon demand less clothing, recreation, perhaps food, and other goods and services. Sufficient cuts in demand will bring layoffs or part-time work to others who produce or sell the goods or services that are now in less demand. In turn, these persons will curtail their demands and the cycle of unemployment-curtailed demand-further unemployment continues. Just when these effects will fade away and the trend be reversed goes too far into the realm of economic theory for discussion here.

Conditions other than increases in efficiency give rise to unemployment. The unemployment existing at any one time will not be evenly spread throughout all industries and all parts of the country: the soft coal producing areas of the country were some of the most depressed in the 1930's; the carriage making industry and the harness industry have declined to almost nothing; the fertility of the land is drained or the land itself washes away and the farmers gradually drift to some other work. Meanwhile, other industries or parts of the country may be booming. But when coal miners or carriage makers find themselves out of work, it is not of much assistance to know that bakers or oil field workers are needed. Many do not have the requisite skills, and if they do, the work may be far removed from their homes. In many instances, the organization of the labor market is so imperfect that the availability of jobs may not be known. Despite the effect of some of these factors on employment, the cyclical failure of the economy to absorb our full production is the paramount problem.

In view of the increasing frequency of periods of considerable unemployment and of its direct and indirect results, it became clear by the 1930's that some program intended to decrease the amount of unemployment was imperative. The events of the World War I period showed that private industry that was relatively uncontrolled was not able to offer full-time employment to all those who were willing and able to work. And the events of the early 1930's, during which we pursued that elusive corner around which prosperity was lurking, did not add to the confidence of the public in the ability of uncontrolled private enterprise to offer full employment. It became more and more evident that unemployment sprang largely from conditions basic to our entire economy; these economy-wide conditions were not such as could be controlled by individual employers.

The causes were beyond the control of individual businesses, and there was no unanimity of action brought by business organizations

on a widespread program of alleviating unemployment; thus, there was a need in the early 1930's for some sort of government program to do that which business had been unable to do. Local and state governments varied widely in attitudes and financial resources, likewise in the proportion of unemployment, so a nation-wide, well-financed program could be none other than a federal program. Since there never had been in this country any significant experience with government efforts to combat unemployment to which to refer, a number of different programs were tried; many mistakes were made, but the emergency was such that bold experimenting had to be done. It is now time to consider some of the measures tried.

#### Government unemployment programs: public employment service

Two general types of action have been taken to combat unemployment; either of the two could be further subdivided if so desired. One type of program includes those actions that seek to shorten the duration of unemployment or ease its undesirable effects. Under this might be listed the system of public employment offices, the unemployment compensation program, and various public assistance programs. A second broad field of action is that which seeks to put those out of work back on the job. These actions would include public works programs and programs designed to encourage employment in private enterprise. In terms of the time of action, attempts at the creation of a system of public employment exchanges came first. It will be remembered that the first concerted effort to develop a national system of employment exchanges came during the first World War.<sup>7</sup> This system was curtailed after peace came about as quickly as it was built up during the war. Federal-state jealousies, criticism of the director of the service, and the general postwar desire to escape from wartime controls were some of the reasons for the hasty curtailment.<sup>8</sup>

Aside from operating a few farm labor offices and veterans' offices, all that the United States Employment Service did between 1919 and 1933 was to provide some slight subsidies to state employment offices and gather some statistics on the employment situation. Farm labor placement was carried out more effectively than was any other service, but an average of only about twenty farm labor offices were operated.<sup>9</sup> Such a number of offices must have been efficient, indeed, to direct nearly 900,000 persons to employment in the fiscal year of 1932. Even though the farm labor service might have been

<sup>7</sup> See Ch. IX.

<sup>8</sup> Millis, H. A., and Montgomery, R. E., *op. cit.*, Vol. III, p. 62.

<sup>9</sup> Kellogg, Ruth M., *The United States Employment Service*, p. 56. Chicago: The University of Chicago Press, 1933.



well organized, it was very limited in its coverage, and no other part of the skeleton service was adequate in any sense of the word.

Because the need for a vitalized nation-wide system of employment exchanges was recognized, conferences were begun in 1919 between representatives of bureaus of the federal government, of many of the states, and of business and labor groups in an attempt to agree on a draft of a bill providing for a new employment service. After various events, such a bill finally reached the hearings stage in 1928 under the sponsorship of Senator Wagner. In the late winter of 1931 the bill was passed by both houses of Congress by heavy majorities. Essentially, it called for the creation in the Department of Labor of an employment service that would establish and maintain a national system of employment offices and help in inaugurating such a public system in states and their political subdivisions. Of the money appropriated under the act, seventy-five per cent was to be apportioned among the states. The bill provided for the abolition of the then existing employment service.

President Hoover vetoed the bill. In his veto message the President objected to the federal-state system called for in the bill. It seems ironic that the President objected to the abolition of the "established employment service" in the Department of Labor, the service that was operating some twenty farm labor offices and a like number of veterans' offices. As a substitute for the vetoed bill, the President asked Secretary of Labor Doak to reorganize the existing service.<sup>10</sup> The reorganization did not produce startling results and the need for an active and well-organized service was about as great after the change as before.

In June, 1933, the Congress passed a revision of the Wagner bill that had been vetoed in 1931. The new law<sup>11</sup> was approved by President Roosevelt, and on July 1, 1933, the new employment service was activated. As did its predecessor, the Wagner-Peyser Act provided for the establishment of a national employment system and for cooperation with the states in promoting such a system. Up to seventy-five per cent of the federal funds appropriated could be made available to the states; in order to qualify for federal aid, state and local offices had to meet certain minimum standards of efficiency. States wishing such grants were required to agree to abide by the federal standards and match the federal grant. Under this stimulus, all the states and Alaska and Hawaii had become affiliated with the federal service before the end of 1937.<sup>12</sup>

<sup>10</sup> Kellogg, R. M., *op. cit.*, Chs. III, IV, and V.

<sup>11</sup> U. S. Code 1940, Title 29, Secs. 49-491.

<sup>12</sup> U. S. Bureau of Labor Statistics, Bulletin No. 694. *Handbook of Labor Statistics* (1941 edition), p. 155.

Under the authorization of the Wagner-Peyser Act, the federal government not only aided the states in the establishment and maintenance of public employment offices, but established and maintained offices of its own under the National Reemployment Service program. Under this emergency program, the reemployment service was operating in mid-year 1935 nearly 1800 district and branch employment offices; this was a sharp contrast with the approximately 150 offices functioning in 1932 under the Doak reorganization of the old employment service. For the fiscal year of 1935 about two and three-fourths million placements were reported, and by 1940 this number had grown to 3,500,000. Although early placements were largely on relief and public works projects, by 1940 about eighty-five per cent of the annual placements were in private employment.<sup>13</sup>

As established under the Wagner-Peyser Act, the employment service was in the Department of Labor. It remained there until 1939, when it was shifted to the Social Security Board. The purpose of the shift was to bring a closer relationship with the unemployment compensation functions of the Social Security Board, in view of the fact that in order to qualify for unemployment compensation a person had to register for work with the employment service and that agency had to be unable to provide work. This move was a logical one owing to the necessary coordination that must exist between placement and compensation services.

After the transfer, the employment service remained without significant change until September, 1942. By that time the war emergency was beginning to minimize claims for unemployment benefits and to emphasize the necessity of supplying labor to war industries. Therefore, the service was transferred by Executive Order 9247 to the newly created War Manpower Commission; at the same time the state employment services were taken over by the federal government.<sup>14</sup> There they remained until November 15, 1946 when they were returned to the states.

In discussing the reestablishment of the employment service as a means of combatting unemployment, it is not meant to imply that it had an effect of decreasing the total number of unemployed. However, the work of the service might have shortened the duration of a period of unemployment. In a locality of considerable size a job seeker cannot canvass all possible employers with frequency. However, through an employment office to which, ideally, all available job opportunities are reported it is much easier to keep abreast

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<sup>13</sup> *Ibid.*

<sup>14</sup> See below, Ch. XXIII.

of the situation. Even without perfect functioning, the job-seeking problem is much simpler. One further benefit might be noted. If properly run, the public employment service should result in better placement; if this occurs, there will be fewer resignations and discharges and less unemployment resulting from these causes. It is probable, however, that job displacement for these reasons is relatively unimportant in the over-all picture of causes of unemployment.

#### Other government action affecting unemployment

Another means of easing the ill effects of unemployment is by relief of some sort. Here, again, the element of reducing unemployment is slight; if more goods are demanded as a result of a relief program than otherwise would be, then the amount of unemployment may decline, but such an effect will not be marked; even without relief unemployed persons must wear some clothing, consume irreducible minimum amounts of food, and occupy shelter. Only if relief provides more than do relatives, private charity, or any such means of care will it tend to cause any appreciably larger demand. During normal or non-emergency periods relief or grants in aid have been reserved largely for those who were blind or otherwise handicapped, the needy aged, dependent children, and similar cases. However, in periods of emergency relief grants and goods have been supplied to many who were able to earn their own living if given a chance. Since the granting of relief is dependent upon proof of need to some investigator and is directed at alleviating especial hardship rather than combatting unemployment as such, it need not be discussed in any detail at this point.

There are government measures that act as a direct spur to employment. These may be either through direct employment on government projects or through various policies encouraging private enterprise to boost employment. One of the outstanding, although not the most desirable, boosters of employment is war. In time of war the number of employees of the federal government increases by leaps and bounds—in the departments of the government, in military establishments, on construction projects, in ship-repair yards, and elsewhere. In addition, there is the "employment" of large numbers in the armed forces. Perhaps still more important is the enormous increase in the purchases of the government; almost every conceivable item is needed in greatly increased quantities, some in thousands of times the prewar number. As a result of the increase in government employment and its demand for more goods plus the increased demands of many employees with high earnings we attain in wartime the happy state of affairs in which almost any per-

son looking for a job is able to find one. Perhaps the most important question before the national economy today is whether it can offer relatively full employment over a long period of time without war. Peace, with perhaps one-fifth of all workers unable to find a job, may be better than war, but it is neither a satisfactory nor a stable state of affairs.

There are other means of combatting unemployment short of war. One used during the early years of the Roosevelt administration was direct employment of the jobless on public works projects, including public buildings, land reclamation, building of parks and recreation facilities, and other less useful jobs. Although such work needed to be done in the 1930's and much of it still is worth while, there was considerable objection to it; the fear of government expansion and competition with private enterprise was strong, and the increased government indebtedness and taxation and alleged inefficiency on many of the jobs gave excellent grounds for criticism. Nevertheless, there are many convincing arguments in favor of government work projects as a means of combatting unemployment. There are many needed improvements in public buildings, roads, parks, land reclamation, and so forth that do not compete directly with private enterprise. And there seems to be no valid reason why such work cannot be done as efficiently as under any other circumstances. However, if employment is the prime objective, as it was in the 1930 emergency, efficiency of operation may not be given the emphasis that would otherwise prevail.

Whatever the motivation, work projects are a much more desirable attack on unemployment than outright relief. The product that accrues to society from the work is a benefit, and the maintenance of skill, physique, and morale, while somewhat intangible, is an important advantage of such work projects. However, for such works to be fully effective with regard to timing, type of accomplishment, extent of the program, and so forth many questions of statistics and economic theory must be answered.

In peacetime the measures that government may take to encourage private employment are wide and varied. Since their effects are largely indirect, such actions are rarely thought of as labor laws or labor-related action. The type of government programs that might have such effects will only be listed here. Changes in the control of installment buying may have a temporary effect on market demand for durable goods and therefore on employment. The rediscount rates of the Federal Reserve System and our foreign trade policies will have their effect. The method of levying taxes and their level are important factors. And preparation for and the immediate aftermaths of war bring great activity to business. Other

government purchasing policies will affect the total production of goods.

### Unemployment compensation

Along with the employment service, the most important legislative development directed at the problem of unemployment that came from the years between the wars was unemployment insurance, or more accurately, since there is little of the true character of insurance in the laws, unemployment compensation. Such laws were based on a recognition of the fact that some unemployment is inevitable even though some of the measures sketched above may reduce the severity of cyclical idleness. Certainly the desire to abolish cyclical unemployment will not be realized fully, and, in addition, some jobs are seasonal, some industries or plants decline while others grow, and machines break down or materials are sometimes short. Thus, whatever the program to decrease the amount of unemployment, a certain amount of it—an irreducible minimum—<sup>15</sup> is inescapable. Therefore, along with machinery for efficient placement of workers, an intelligent program of government action against unemployment requires that society make some provision for guaranteeing a minimum income to persons out of work through no fault of their own. If there are conditions in our economy that make it impossible for able persons to find work at some times, then at least a part of the burden of enforced idleness should be taken from the unemployed person and family.

There were many examples of unemployment compensation in foreign countries for the United States to observe before 1930, but neither the federal government nor any state had seen fit to provide any similar compensation for those persons able to work and out of work through no fault of their own. Perhaps the greatest reason for this tardiness of action came from the refusal of many people to recognize that there were conditions inherent in our economy that made it impossible for all persons to keep a job at all times if they really wanted to do so. There was also a lack of sufficient realization that incomes were such that it was not feasible for each worker to build large enough reserves to carry him through periods without income.

Interest in unemployment compensation was aroused before the first World War; in 1914 the American Association for Labor Legis-

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<sup>15</sup> See: Pearlman, L. M., and Eskin, L., "Nature and Extent of Frictional Unemployment." *Monthly Labor Review*, January, 1947, Vol. 64, No. 1, pp. 1-10, for an analysis of the nature and extent of such unemployment. This article estimates that even in prosperous times some two to two and one-half million persons in the nation will of necessity be unemployed.

lation prepared a model bill patterned on British legislation, which was introduced, unsuccessfully, into the Massachusetts legislature.<sup>16</sup> In the postwar recession of 1921 the Wisconsin legislature considered an unemployment compensation bill but did not enact it. In that state a compensation bill was reintroduced in each succeeding session of the legislature until passed in 1932, but elsewhere in the nation the theory of a permanent and growing prosperity temporarily made unemployment compensation a lost cause. After the crash of 1929 the growing amount of unemployment encouraged interest in an examination of some sort of compensation for the jobless. By 1931 a half-dozen states had named investigating committees to study the problem, and in a larger number some sort of compensation bill had been introduced. In 1933 105 unemployment compensation bills were introduced in state legislatures and Congress.<sup>17</sup>

Meanwhile, Wisconsin had acted. The recurrent consideration in the 1920's of a compensation bill bore fruit in a special session of the legislature that passed an unemployment compensation law in January, 1932. Although it left much to be desired, it merits some attention as the pioneer such law enacted in the United States. It was in many ways a strange act<sup>18</sup> seeking to put pressure on employers to regularize employment or make provision for periods of unemployment. It gave employers an opportunity to establish by June, 1933 (subsequently extended to April, 1934) voluntary unemployment compensation plans for a majority of the industrial employees of the state. Failing this, the law required compulsory establishment of such plans; owing to the insufficient number of plans the act did become compulsory in April, 1934.<sup>19</sup> It applied to employers of ten or more persons, excluding as usual farm and domestic labor, government employees, and workers on interstate railways. The law provided for the maintenance of separate reserve accounts for each employer. His contribution to the fund—none was made by the worker—was two per cent of his annual payroll, excepting salaries above \$300 per month or \$1500 per annum, until the reserve reached \$55 per employee. When the fund reached that level, the contribution rate dropped to one per cent, where it remained until the reserve reached \$75 per month; at that point, contributions stopped, to be resumed when the average fell below \$75 per employee.

<sup>16</sup> Commons, J., and Andrews, J., *op. cit.*, p. 298.

<sup>17</sup> Millis, H. A., and Montgomery, R. E., *op. cit.*, Vol. II, p. 141.

<sup>18</sup> Chapter 20, Wisconsin Special Sessions Laws of 1931; it is reproduced in full in *Monthly Labor Review*, March, 1932, Vol. 34, No. 3, pp. 540-552.

<sup>19</sup> U. S. Bureau of Labor Statistics, Bulletin No. 616, *Handbook of Labor Statistics* (1936 edition), p. 819.

Benefits were to be payable after a waiting period of two weeks; ten weeks benefits in any one calendar year were the maximum amount allowed. The amount payable was one-half the average weekly wage or \$10 per week, whichever was lower, with a minimum of \$5 per week. One dollar per week was added if the claimant attended school during the period of idleness. Persons were disqualified if they quit their work or were discharged for misconduct or were idle because of a trade dispute. Benefits finally became payable under the act after July 1, 1935.

It will be seen that some of the provisions of the law were not adequate to meet the requirements of the section of the Social Security Act dealing with unemployment compensation, but the Social Security Act was not controlling at that time; there was at least one other serious objection to the law, however. Provision was made for separate employment compensation accounts for each employer, from which his idle workers could be paid. There is implied in this type of organization an assumption that unemployment is the responsibility of individual employers and that, therefore, those employers able to offer steady employment should be rewarded by lower contributions. Although it is true that employers can do something to regulate their work, it is unwise to assume that the crux of the problem of unemployment is within the control of the individual employer. Some occupations are seasonal and there is little that can be done to alter the fact, other employments are relatively steady with little need for attempts at regularizing; moreover, depression periods come as a result of widespread economic conditions and not of the malpractices or lack of foresight of an individual businessman. If unemployment is not a result of the practices of individuals, the provision of compensation therefor should not be on an individual basis.

While Wisconsin acted other states were not entirely idle. California, Connecticut, Massachusetts, Minnesota, Ohio, Pennsylvania, and Virginia appointed committees to study and advise on the enactment of such laws. The reports generally favored compensation laws,<sup>20</sup> but there was keen opposition from many sources. The opposition was successful in preventing passage of any law other than that of Wisconsin until 1935; the theory of individualism and the fear of dire results coming from the coddling of workers by the government still struck a responsive chord with many in the legislative chambers. And, in addition, the employers in any state could argue that the costs of a compensation law would put them at a competi-

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<sup>20</sup> U. S. Bureau of Labor Statistics, Bulletin No. 616, *Handbook of Labor Statistics* (1936 edition), pp. 821-827.

tive disadvantage with the employers of other states having no such laws.

The fear of competitive disadvantage voiced in the different states was stopped by the passage of the Social Security Act. The unemployment tax provisions of the act were drawn in such a manner that opposition to legislation was swept away, not by any particular change of heart but because it was to the financial advantage of every state to enact an adequate compensation law. Thus, the federal law did not itself establish unemployment compensation laws, but it created a situation in which the states could not well afford to ignore the problem.

The Social Security Act of 1935<sup>21</sup> levied on employers of eight or more persons a tax of one per cent of their payrolls in 1936, two per cent in 1937, and three per cent in 1938 and thereafter. Agricultural and domestic employees, government workers, and a few others were not covered. Provision was made, however, that not all the money paid by the employers of any one state need be lost to that state. If any state saw fit to enact an unemployment compensation law that was acceptable in its provisions, ninety per cent of the tax paid by the employers would revert to the state for use only in its unemployment compensation program. In addition, from the ten per cent of the tax held by the federal government, grants could be made to the states to aid in meeting administrative costs of the unemployment compensation law. One point might well be noted here; there was no exception in the law of employees earning more than a certain amount or of salaried workers, although the tax was levied only on the first \$3000 of annual income. It should be noted that employers only were taxed; employees might be taxed if the states so legislated in establishing unemployment compensation, but as far as federal and most state laws were concerned, the compensation was provided for workers without requiring contributions from them.

The revenue collected through the unemployment compensation tax is paid to the federal treasury, where an unemployment trust fund is established. The amount contributed by each state is carried in a separate account, payable to that state for expenditures for unemployment compensation only if the state plan meets certain standards. These requirements include:

(1) All unemployment is to be paid for through public employment offices or other agencies approved by the Social Security Administration<sup>22</sup> of the Federal Security Agency.

<sup>21</sup> 49 Stat. 620; amended significantly in 1939 and 1946.

<sup>22</sup> Known as the Social Security Board until the reorganization of July, 1946. The titles are used interchangeably herein.



(2) All moneys received for the unemployment fund must be paid immediately to the treasury.

(3) All moneys withdrawn from the unemployment trust fund must be used exclusively for unemployment compensation or for certain types of refunds.

(4) Compensation shall not be denied to a worker solely because of refusal to accept work (a) if the job is available because of a strike or lockout or other labor dispute, (b) if the wages, hours, or other working conditions on the proffered job are substantially worse than those prevailing for similar work in the locality, or (c) if as a condition of employment the individual would have to join a company union or resign from or refrain from joining a *bona fide* union.

If all of the above requirements are met, in the opinion of the Social Security Administration, a tax of only 0.3 per cent need be paid to and retained by the federal treasury. The funds accruing from the 0.3 per cent tax will in part be redistributed to the states to defray administrative costs. Any other taxes payable under the unemployment compensation program may be collected and paid by the states to the federal treasury. However, the states are not required to levy taxes in any specified manner. It will be recalled that the federal tax was levied only on employers of eight or more workers. There is no provision, however, that requires the state to tax only employers, to exempt employers of fewer than eight workers, or to levy the same tax on all employers regardless of their employment record.

If the board finds after reasonable notice and investigation that any state has denied, in a substantial number of cases, compensation due to individuals or has failed to observe other regulations noted above, it is empowered to deny grants of money to the state until the abuses are stopped. Thus, the states are subject to a relatively strict supervision by the board as a requisite to regaining the moneys paid in by the states' employers. Under the stimulus of loss of funds from failure to enact a law or to observe minimum standards once a law was passed, all states swung into action. By mid-year 1937 every state and Alaska, Hawaii, and the District of Columbia had such laws. The principle that had been so distasteful before the tax-offset plan had been legislated suddenly became acceptable—in fact, desirable. For the failure of Ohio, for example, to enact an adequate law would have meant that taxes paid by Ohio employers might be spent in California rather than in Ohio; that would never do!

The laws enacted by the states vary in many details but there are numerous similarities. Before noting the variations that are to be found, it might be well to summarize what could be considered

representative of, although not exactly the same as, any one state law. The average law would provide for the levying of an unemployment tax on employers of six or eight or more, and would exempt the same general groups exempted from the federal tax. Rates probably would be less for employers with good employment records. Provision would be made for transfer of the moneys to the federal treasury. Before a person would be considered eligible for benefits, he must have registered with the employment service, waited at least a week, and been told that there was no work available. As to benefits payable, the law would set a minimum of \$5 to \$8 weekly and a maximum of \$18 or \$20 weekly. Between these limits the benefit would probably have been set at roughly half of the average weekly wage. There would be specification of a maximum number of weeks in a calendar year in which benefits could be paid to an individual, probably about twenty weeks. There would probably also be some provision that a certain ratio between weeks of employment or earnings within the year and weeks of benefits be maintained, perhaps one week of benefits for every three or four weeks of employment.

Finally, a number of conditions would be specified under which an unemployed person would be disqualified from receiving benefits. These provisions would be such as to permit benefits only if the claimant is able to work and is idle through no fault of his own. Thus, a person who voluntarily quit his job or was discharged for misconduct on the job could not draw compensation; neither could the person who refused to accept suitable work. In the average case, a person idle because of a labor dispute, who is injured, or is otherwise incapable of work cannot draw benefits.

The great number of diversities in individual laws makes it unwise to attempt to mention all the variations that are to be found. However, some examination is needed to show the range of provisions; in this connection, it should be kept in mind that standards and practices of administration vary as widely as legislative provisions. Terms such as "the refusal of suitable work" and when "able to work" or the exemptions from payment allowed by a labor dispute are not at all clear. Thus, those who apply the laws can do much to make them effective or ineffective.

In noting the variations in the laws, the coverage might be examined first. The federal law set the maximum size plant to be exempted as those employing no more than seven persons; approximately forty per cent of the state and territorial laws of 1946 continued this exemption. On the other hand, nearly a third covered all plants with one or more employees. State exemptions of occupational groups coincide much more closely with those of the federal

SIGNIFICANT PROVISIONS OF STATE UNEMPLOYMENT INSURANCE LAWS, SEPTEMBER 15, 1947

State	Size of Firm (minimum number of employees and/or size of payroll in a calendar year)	Wage or Employment Qualification (number times weekly benefit amount unless otherwise indicated)	Initial Waiting Period (weeks)		Computation of Weekly Benefit Amount (fraction of high-quarter wages unless otherwise indicated)	Weekly Benefit Amount for Total Unemployment		Weekly Benefit Amount for Partial Unemployment (weekly benefit less wages in excess of specified earnings allowance)	Duration in 52-Week Period	
			Total	Partial		Minimum	Maximum		Proportion of Wages in 4-Quarter Base Period (unless otherwise indicated)	Minimum and Maximum Weeks
Alabama.....	8 in 30 weeks	30; and \$75.01 in 1 quarter	1	2	1/20	\$4	\$30	\$2	1/3	10-20
Alaska.....	1 at any time	\$160	1	1	1/20	8	25	5	1/3	8-25
Arizona.....	3 in 20 weeks	30; and wages in 2 quarters	1	1	1/20	5	20	3	Uniform	12
Arkansas.....	1 in 10 days	30	1	1	1/24	5	20	3	Lesser: 1/3 of base- period wages or 4 times wages with at least 1/3 of high- quarter	4-16
California <sup>1</sup> .....	1 at any time and \$100 in same quarter	\$300 (effective 1/1/48, greater of \$300, and 1/3 of high-quarter wages in the other 3 base- period quarters or 30 times wba, whichever is less)	1	1	1/30 (effective 1/1/48, 1/20-1/25)	10	30 (effective 1/1/48, \$25)	3	Weighted schedule 54-33% (effective 1/1/48, 1/2)	4 <sup>9</sup> -23.4 (effective 1/1/48, 12-26)
Colorado.....	8 in 20 weeks	30	2	2	1/25	6	17.50	3	1/3	10-20
Connecticut.....	4 in 13 weeks	\$240 (and effective 4/4/48, wages in 2 quarters)	1	1	1/25, plus \$2 for each dependent up to the lesser of \$6 and 1/2 wba (effective 4/4/48, plus \$3 for each dependent up to 1/2 wba)	8-12	22-28 (effective 4/4/48, \$24-36)	2 (effective 83)	1/4 1/4	4 <sup>0</sup> -20 (effective 4/4/48, 6 <sup>7</sup> -22)
Delaware.....	1 in 20 weeks	30	1	1	1/25	7	18	2	1/4	11-22
District of Columbia	1 at any time	25 up to \$250	1	1	1/23, plus \$1 for each dependent, up to \$3	6-9	20	2/3 of wba	1/2	4 <sup>10</sup> -20
Florida.....	8 in 20 weeks	30; and wages in 2 quarters	1	1	1/18-1/24	5	15	3	1/4	7 <sup>7</sup> -16

Georgia.....	8 in 20 weeks	25, 30, 40, and wages in 2 quarters	2	2	1/23-1/26	4	18	\$	Uniform	16
Hawaii.....	1 at any time	30	1	1	1/25	5	25	0	Uniform	20
Idaho.....	\$75 in any quarter	25-37 <sup>+</sup> ; and \$150 in 1 quarter and wages in 2 quarters	1	1	1/19-1/24	10	20	5	Weighted schedule 40-22 <sup>2</sup> %	10-20
Illinois.....	6 in 20 weeks	\$325	1	1	1/20	10	20	2	Weighted schedule 36-33 <sup>2</sup> %	10-26
Indiana.....	8 in 20 weeks	\$250 and \$150 in last 2 quarters	1	1	1/25	5	20	\$ from other than regular employer	1/4	6 <sup>+</sup> -20
Iowa.....	8 in 15 weeks	20	1	2	1/23	5	20	3	1/3	6 <sup>+</sup> -20
Kansas.....	8 in 20 weeks or 25 in 1 week	\$100 in 2 quarters or \$200 in 1 quarter	1	1	1/25	5	18	2	1/3	6 <sup>+</sup> -20
Kentucky.....	4 in 3 quarters of preceding year each with wages of \$50 in each quarter, or 8 in 20 weeks	\$200	1	1	Annual wage formula; weighted schedule 2.5%-1%	5	16	1/5 of wages	Uniform	20
Louisiana.....	4 in 20 weeks	30	1	1	1/25	3	18	2	1/4	7 <sup>+</sup> -20
Maine.....	8 in 20 weeks	\$300	1	1	Annual wage formula; weighted schedule 2%-1%	6	20	\$	Uniform	20
Maryland.....	1 at any time	40; and \$150 in 1 quarter	0	0	1/26	6	25	2	1/4	10-26
Massachusetts.....	1 in 20 weeks	\$150	1	2	1/20, plus \$2 for each dependent, total age weekly wage not to exceed aver- age weekly wage	6	25 <sup>2</sup>	0	3/10	4.5 <sup>+</sup> -5
Michigan <sup>1</sup> .....	8 in 20 weeks	\$250 and wages in 2 quarters (effective 1/1/48, 14 weeks of employment at \$8 or more)	1	1	4.81 (effective 1/1/48, 84-7)	4.81 (effective 1/1/48, 84-7)	20-23	Lesser: \$3 or 1/4 of wages (effective 1/1/48, wha if wages less than 1/2 basic wha; 1/2 wha if wages are at least 1/2 basic wha)	1/4 if \$900; less than \$900, lesser of 3/10 or \$200 (effective 1/1/48, 2/3 of weeks of employ- ment)	13-30 (effective 1/1/48, 9 <sup>+</sup> -20)
Minnesota.....	1 in 20 weeks	\$200	2	2	Annual wage formula; weighted schedule 3.0%-1.1%	7	20	\$	Weighted schedule 37-22 <sup>2</sup> %	12-20

(Continued on next page)

SIGNIFICANT PROVISIONS OF STATE UNEMPLOYMENT INSURANCE LAWS, SEPTEMBER 15, 1947 (Continued)

State	Size of Firm (minimum number of employees and/or size of payroll in a calendar year)	Wage or Employment Qualification (number times weekly benefit amount unless otherwise indicated)	Initial Waiting Period (weeks)		Computation of Weekly Benefit Amount (fraction of high-quarter wages <sup>2</sup> unless otherwise indicated)	Weekly Benefit Amount for Total Unemployment		Weekly Benefit Amount <sup>1</sup> for Partial Unemployment (weekly benefit less wages in excess of specified earnings allowance)	Duration in 52-Week Period	
			Total	Partial		Minimum	Maximum		Proportion of Wages in 4-Quarter Base Period (unless otherwise indicated)	Minimum and Maximum Weeks
Mississippi.....	8 in 20 weeks	30	2	2	1/30	3	15	2	Uniform	14
Missouri.....	8 in 20 weeks	40 and wages in 3 quarters of 8-quar- ter base period	1	2	1/25	7 0.50	20	1/9 of wages	1/4 in 8 quarters	7 1 <sup>+</sup> -30
Montana.....	1 in 20 weeks or \$500 in a year	30	2	( <sup>6</sup> )	1/32	7	18	( <sup>6</sup> )	Uniform	10
Nbraska.....	8 in 20 weeks or \$10,000 in any quarter	\$200	2	2	1/25	5	18	3	1/3	4 7 <sup>+</sup> -18
Nevada.....	\$225 in any quar- ter	30	1	1	1/20, plus \$2 for each dependent, up to \$6	8-14	20-26	3	1/3	10-30
New Hampshire.....	4 in 20 weeks	\$200	1	2	Annual wage formula; weighted schedule 3% <sup>1</sup> -0.9% <sup>2</sup>	6	22	3	Uniform	23
New Jersey.....	4 in 20 weeks	\$150	1	1	1/32	9	22	3	1/3	10-36
New Mexico.....	\$450 in any quar- ter or 2 in 18 weeks	30; and \$75 in 1 quar- ter	1	1	1/36	5	20	3	2/5	13-30
New York.....	4 in 15 days	30	* 1	( <sup>6</sup> )	1/23	10	21	( <sup>6</sup> )	Uniform	20
North Carolina.....	8 in 20 weeks	\$180	1	2	Annual wage formula; weighted schedule 3.1%-0.9% <sup>2</sup>	4	20	2	Uniform	10
North Dakota.....	8 in 20 weeks	28	1	1	1/30-1/23	5	21	3	Uniform	20
Ohio.....	3 at any time	20 calendar weeks of employment and \$160	2	2	1/30-1/23	5	21	3	Depends on calendar weeks of employ- ment	19-22
Oklahoma.....	8 in 20 weeks	20	1	1	1/30	6	18	2	1/3	6 <sup>+</sup> -20
Oregon.....	4 at any time and \$500 in any quarter	\$300	1	1	Annual wage formula; weighted schedule 3.3%-1.3% <sup>2</sup>	10	20	2	1/4	7 <sup>+</sup> -20
Pennsylvania.....	1 at any time	20	1	1	1/25	8	20	3	3/10	9-24
Rhode Island.....	4 in 20 weeks	\$100	1	2	1/20	10	25	3 from odd jobs	Weighted schedule 35%-27%	5 <sup>+</sup> -26
South Carolina.....	8 in 20 weeks	40; 30 if who is \$4	1	1	1/26	4	20	1	Uniform	16
South Dakota.....	8 in 20 weeks	\$125 and \$60 in 1 quarter	1	1	1/20-1/25	6	20	3	Weighted schedule 45%-32%	4 6 <sup>+</sup> -20

Tennessee.....	8 in 20 weeks	30; \$25 if wba is \$25 and \$50 in 1 quarter	1	2	1/20-1/26	5	18	3	Uniform	20
Texas.....	8 in 20 weeks	9 times benefit rate for 2-week period	1	1	1/13 for 2-week period	10 for 2 weeks	36 for 2 weeks	4 for 2 weeks	1/5	1 <sup>+</sup> -9 2-week periods 15-25
Utah.....	\$140 in any quarter	14% of average state wage and higher of \$150 or 150% of high-quarter wages	1	1	1/20	5-7 depending on cost of living	17-25 depending on cost of living	6	Weighted schedule and percent of average state wage	
Vermont.....	8 in 20 weeks	30; and \$50 in 1 quarter	1	1	1/18-1/26	6	20	3	Uniform	20
Virginia.....	8 in 20 weeks	25; 20 if wba is \$5	1	1	1/45	5	15	2	1/4	6-16
Washington.....	1 at any time	\$500	1	1	Annual wage formula; weighted schedule 3.3-1.1%	10	25	5	Weighted schedule 40-20%	12-26
West Virginia.....	8 in 20 weeks	\$300	1	0	Annual wage formula; weighted schedule 2.7-1.1%	8	20	3	Uniform	21
Wisconsin <sup>1</sup> .....	6 in 18 weeks or \$10,000 in any quarter	14 weeks of employment within 32 weeks	2	0	84+/-51+/-% of average weekly wage (effective 1/1/48, 70%-51+/-% of average weekly wage)	8	20 (effective 1/1/48, 824)	Wba, if wages less than 1/2 wba; 1/2 wba, if wages are at least 1/2 of wba	3/5 of credit weeks of employment	8 <sup>+</sup> -24
Wyoming.....	\$500	25; and \$70 in 1 quarter	2	2	1/20	7	20	3	1/4	6 <sup>+</sup> -20

<sup>1</sup> Weekly benefit amount abbreviated in columns as wba.

The fraction of high-quarter wages applies between the minimum and maximum amounts. When state uses a weighted table, approximate fractions are figured at midpoint of brackets between minimum and maximum. When dependents' allowances are provided, the fraction applies to the basic benefit amount. With annual wage formula, fraction is minimum and maximum percentage used in any wage bracket.

New provisions are applicable only with respect to claims filed on or after effective date shown.

If qualifying wages are concentrated largely or wholly in the high quarter, weekly benefit may be higher than the minimum and weeks of benefits for claimants with minimum qualifying wages are less than weeks of benefits for claimants with minimum weekly benefit amount and minimum qualifying wages; in Illinois, statutory minimum.

Maximum augmented payment to individual with dependents not shown since highest average weekly wage may be \$231 and any figure presented would be based on an assumed maximum number of dependents.

Weeks of duration for claimants with dependents decreased since potential benefits are the same whether or not a claimant has dependents.

If the benefit is less than \$3, benefits are paid at the rate of \$3 a week and weeks of duration are accordingly reduced.

No partial benefits paid, but earnings not exceeding the greater of \$7 or 1 day's work of 8 hours are disregarded.

Benefits are paid for each accumulation of 4 "effective days." "Effective day" is defined as the 4th and every subsequent day of total unemployment in a week in which not more than \$24 is paid to the individual. Waiting period is 4 effective days accumulated in 1-4 weeks.

FEDERAL SECURITY AGENCY, Social Security Administration: Prepared by the Bureau of Employment Security for ready reference and comparative purposes. Because of the impossibility of giving qualifications and alternatives in brief summary form, the state law and state Employment Security Agency should be consulted for authoritative information. In general, the state laws cover employment in most types of business and industry, except employment for railroads which is covered by a separate federal law.

tax. Only New York provides coverage of domestics, and this only when four or more are employed. A few states include certain workers on "industrialized" farms. Government employees are almost entirely excluded.

After registering at the employment office and filing a claim, before he receives the first payment of benefits the unemployed person is required to wait for a stipulated period. No benefits are payable for the waiting period. Only Maryland has no waiting period, all other states specifying either one or two weeks; one week is the more commonly specified time. Such a waiting period is defensible on a number of grounds. When a person becomes unemployed, he has some income paid to him at the time or due to him shortly thereafter. This income will carry the person over a relatively short period. Administratively it is wise to have such a waiting period because the processing of all claims for idleness of two or three days would add greatly to the paper work involved. Finally, it is reasonable to assume that an individual should meet expenses of relatively short periods of idleness; to the government belongs the job of underwriting severe and long-lasting economic risks, but not every little one.

All laws make some provisions concerning weekly benefits; minimum and maximum payments are set and the maximum number of weeks of benefits in a calendar year specified. Minimum weekly benefits range from \$3 in some states<sup>23</sup> to \$10 in others.<sup>24</sup> Five dollars per week is the most common minimum set. Maximum benefits run as high as \$28 per week in Connecticut and Michigan and as low as \$15 in a number of states.<sup>25</sup> A figure of near \$20 per week is by far the most common.

Probably minimum and maximum figures are needed in the laws. Certainly there is need of a minimum figure, and this should have been well above the three to five dollars weekly, found in many of the laws. If the purpose of unemployment compensation is to provide enough income to carry a person without income over a period of idleness, then in 1947, in the postwar period of enormously increased living costs, every law had an unreasonably low minimum. However, computation of benefits as a percentage of average weekly income made this criticism less valid, since wages were then at relatively high levels. Nevertheless, the minimum benefits are in need of reconsideration; even during depressions \$3 to \$5 per week would be an inadequate income for a worker, especially one with a family.

<sup>23</sup> Louisiana, Mississippi, and Missouri.

<sup>24</sup> California, Idaho, Illinois, New York, Oregon, Rhode Island, and Washington.

<sup>25</sup> Florida, Mississippi, and Virginia.

The maxima need reexamination and revision more urgently, for, unlike statutory minima, percentages of average weekly earnings cannot offset the low figure set by law. An income of \$20 to \$25 per week might have been a reasonable subsistence payment in 1940, but the situation has changed. Some maxima are essential, since compensation should not be so attractive as to encourage attempts at malingering, but more flexibility is needed. Perhaps the best answer to the problem is to work out maxima and minima carefully at one time, providing for variations upward and downward with fluctuations of a certain size in some specified cost of living index. This proposal is made on the assumption that unemployment compensation will continue to be used as a substitute for relief or charity rather than as a means of giving enough income to provide significant job opportunities. If the philosophy were to shift toward the provision of job opportunities, the feasibility of a maximum of any sort would be in doubt.

As to the maximum number of weeks of benefits that may be paid to an individual in one year, the figure varies from twelve weeks in Arizona and fourteen in Mississippi to twenty-six in New York and Washington. A common figure is near twenty weeks per year. Many states provide for a ratio of total benefits payable to earnings in a prior period; the stated maximum may not be available in such cases. The justice of this provision is open to question. If all unemployment were of short duration, no question need arise, but in many instances, especially with cyclical unemployment, the period of idleness may extend over a long period. If so, the allowable benefits may be exhausted before work is found. It is reported that in 1941, a relatively prosperous year, about half of those receiving benefits had exhausted them prior to finding another job.<sup>26</sup>

If an unemployed person has no reserves to fall back on and exhausts his compensation benefits as well, he must become a public charge. Probably the morale problem is much greater if a man and family are on relief than if they are drawing benefits to which they consider themselves entitled as the result of work previously done. There is, however, the danger that some persons will try to abuse the law if more extensive or unlimited periods of unemployment compensation are allowed. But if compensation is to provide a livable minimum income until another job can be found, then it is failing in many cases and will fail in many more when depression strikes again.

In raising funds for unemployment compensation, all states make use of merit or experience rating. This means that the tax rate of

<sup>26</sup> Peterson, F., *op. cit.*, p. 716.



an employer is lowered if his record of employment is good. The federal law permits such adjustment of the rates of individual taxpayers. Such plans have disadvantages in so far as building up the unemployment trust fund is concerned. It was estimated that the contributions from the states and territories in 1945, when all but six<sup>27</sup> had rating plans, were forty-one per cent below the amount that would have been provided under the 2.7 per cent specified in the original law. The assumption back of such rating plans is that they reward good employment records, thus giving the employer an incentive to regularize his work. But, as has been stated, some industries are much more unstable or seasonal than others and the causes are largely outside the control of individual businessmen.

Few states collect any taxes from employees. In 1945 only Alabama, Rhode Island, California, and New Jersey did so.<sup>28</sup> In these states the employee rate ranged from 0.2 per cent to 1.0 per cent. At one time nine states collected from employees, but the number has dropped, in part at least, because war prosperity put the funds of the states in excellent condition.

#### Constitutionality of the unemployment compensation program

No piece of legislation as controversial and breaking as sharply with precedent as did unemployment compensation could possibly receive general public acceptance without running the gamut of court scrutiny. Two cases were started in the state of Alabama to test the unemployment compensation taxes of both the federal and state governments. Both cases were decided by the narrowest possible margin; four dissenters held in each case that the taxes were invalid. In both, however, the necessary five justices were convinced that the taxes were valid ones.

In the case of *Steward Machine Co. v. Davis, Collector of Internal Revenue*<sup>29</sup> the validity of the federal social security tax was tested. It was attacked as an unconstitutional levy that placed an excise on the right to employment; it was asserted that the tax also created classifications that were invalid because it did not affect all persons alike, employers of fewer than eight persons, those workers engaged in agriculture, and so on not being covered. It was also claimed that the tax coerced the state into taking action it otherwise would not take.

<sup>27</sup> Alaska, Mississippi, Montana, Rhode Island, Utah, and Washington. Federal Security Agency, Social Security Administration, "Experience Rating: Operations in 1945 and Future Trends," *Social Security Bulletin*, November, 1946, Vol. 9, No. 11, p. 10.

<sup>28</sup> *Ibid.*

<sup>29</sup> 301 U. S. 548 (1937).

The majority of the Court was not convinced by this attack. It recognized that with any tax there was a necessity of making certain exceptions or applying the law to groups that qualified on the basis of certain criteria. In the case at issue the exceptions and classifications were held reasonable and valid. The Court was not convinced that the law was coercive; it admitted that the taxation with a refund for those states that took action to pass unemployment compensation plans was a temptation, but denied that the states were coerced, since they were not compelled to pass such a law. This distinction between temptation encouraging a certain action and coercion is vague and perhaps not too convincing, but it aided the Court in validating the tax. The Court made one very good point in connection with the alleged coercion. Prior to imposition of the general tax on employers of eight or more there was, in fact, a sort of negative coercion discouraging the enactment of unemployment compensation laws, since the states that levied them would have been imposing taxes that put their employers at a competitive disadvantage with those of other states without such laws. Under the federal law, the states were set free to take such action without fear of harming businesses within the state. For the above reasons plus some others centering on the recognition of the vast extent of unemployment as an emergency problem that transcended all state boundaries, the Court decided that the federal tax was within the constitutionally granted powers of Congress.

Perhaps the Carmichael case<sup>80</sup> was the more important of these two. In it the unemployment tax of Alabama was considered by the Court. The state had been forbidden to collect a tax imposed by the state law that applied to approximately the same employers as the federal law, but which levied a relatively low tax on workers' wages as well. In arguing the case before the Supreme Court, the attorneys for the company attacked the tax as invalid under the fourteenth amendment because it did not apply equally to employers of all sizes and in all occupations. It was also asserted that the expenditure of revenues for unemployment relief was not for a public purpose.

Again the Court was unconvinced by the attacks on the law. In its opinion, the exemptions of some occupations and of employers of less than a certain number of workers was a reasonable action by the legislature, an action, indeed, that was necessary from time to time because uniform application of all laws without some restriction or classification was not practical. The Court was of the opin-

<sup>80</sup> *Carmichael, Attorney General of Alabama, et al. v. Southern Coal and Coke Co.*, 301 U. S. 495 (1937). In the same decision the case of *Carmichael against The Gulf States Paper Company* was considered without separate analysis.

ion that expenditures for unemployment were for a public purpose—how anyone could argue otherwise in the 1930's remains a mystery.

Further, the Court held that the fact that moneys were collected from one person and perhaps expended for the benefits of others did not condemn the law. In reaching this conclusion, the Court showed a keen understanding of the impossibility of determining accurately what persons are to be blamed for unemployment. According to the opinion, "The causes of unemployment are too complex to admit of a meticulous appraisal of employer responsibility." Elaborating on this general philosophy at another point in the decision, the Court stated:

"Even if the legislature should undertake, what the Constitution does not require, to place the burden of a tax for unemployment benefits upon those who cause or contribute to unemployment, it might conclude that the burden cannot justly be apportioned among employers according to their unemployment experience. Unemployment in the plant of one employer may be due to competition with another, within or without the state, whose factory is running to capacity; or to tariffs, inventions, changes in fashions, or in market or business conditions for which no employer is responsible, but which may stimulate the business of one and impair or even destroy that of another. Many believe that the responsibility for the business cycle, the chief cause of unemployment, cannot be apportioned to individual employers in accordance with their employment experience; that a business may be least responsible for the depression from which it suffers most."

Such an analysis gave a clear economic refutation to the theory, still embraced by many, that it is possible to determine individual blame for the incidence of unemployment. As a final point in their support, the Court held that the Alabama act was not an invalid product of the coercive operation of the Social Security Act; as in the *Steward Machine Company* case, the reasoning was that the federal law did not cross the boundary between encouragement and coercion.

When Congress passed the Social Security Act in 1935, railroad employers were among the groups that were taxed until the states had enacted an adequate unemployment compensation law. However, in 1938 Congress enacted a separate law dealing with the payment of unemployment compensation to employees of railroads, sleeping car and express companies, certain other concerns performing service in connection with railroad transportation, and certain railway labor organizations. Thus there was established a uniform, nation-wide system of unemployment compensation benefits. The benefits were a flat amount per day based on annual earnings, ranging in weekly payments from \$8.75 to \$25. The payments were

financed by a three per cent tax on the carriers. There was no merit rating and no contribution from workers.

A significant change was made in the 1938 law in 1946; at that time the law was so modified that benefits were payable for temporary personal disability as well as for the idleness of railway workers ready, willing, and able to work. Under certain circumstances, an employee suffering from illness can now draw as much as 130 days benefits in a benefit year. Although led in this development by one state and acting at about the same time as another, the move of the federal government in this direction was an important one. It has been a well-known fact for many years that the average worker was much better off if he could become ill or suffer an accident as a result of conditions on the job than if he suffered the same inconvenience from non-occupational causes. But the hardship and problems involved are no greater and there is little more reason for offering help in the one case than in the other.

A worker does not qualify for benefits if he is drawing unemployment or old age benefits under any other law or if he is unemployed as a result of a strike in violation of the Railway Labor Act. If the worker quits work without good cause or refuses to accept suitable work, he is not considered unemployed for a period of thirty days thereafter. For the first fourteen days of payable idleness there is a seven-day waiting period, so that there is only seven days unemployment compensation for that time. In subsequent periods compensation is paid only for five days per week. To claim benefits an unemployed worker must file with a designated unemployment claims agent. This agent usually is a foreman or other railroad employee not directly connected with the employment service. The worker is not required to accept a job that would bring his expulsion from the union or that would cause loss of substantial seniority rights.

The intra-war period, it has been seen, gave the nation its first extensive experience in positive action to combat unemployment. Much of this action was pioneering and experimental and much of it disappeared with the advent of war prosperity, apparently not to be utilized again until the nation is faced with economic emergency. Although the postwar period has brought a legislative statement acknowledging the federal government's desire for full employment,<sup>31</sup> there is little to indicate that a positive program to combat unemployment will be undertaken until the nation finds itself plagued with mass unemployment. As originally drawn, the Employment Act of 1946 stated that persons had the right to useful

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<sup>31</sup> Public Law 304; 79th Congress, 2nd Session. Approved February 20, 1946. For summary of the law see: *Monthly Labor Review*, April, 1946, Vol. 62, No. 4, p. 586.

employment; to make this statement meaningful, it was proposed that the President submit at the beginning of each session of Congress a report on the economic situation and on the anticipated need for expenditures to maintain full employment.

The act that finally was passed stated that the policy of the federal government was to coordinate the activities of various groups so as to encourage the providing of useful employment opportunities, a far cry from the statement of a "right to work." Under the enactment, it is the responsibility of the President to submit to Congress, within sixty days of the opening of each regular session, a report on economic conditions and trends that exist in the nation plus a review of the economic policy of the nation and of the program and legislation needed.

To aid the President in discharging his duties under the act, a three-man Council of Economic Advisors was created in the Executive Offices of the President. This council, with a relatively small staff, assists and advises the President, gathers timely economic data, and evaluates the economic programs of the government. It also develops and recommends national economic policies. The major weakness of the act is that any action taken under it must be by congressional means; the promptness and wisdom of action to combat unemployment cannot be tested until the economy is faced with a major recession or depression.

Failure to engage in active planning of methods to combat unemployment through public works and other government action narrows the anti-unemployment legacy of the 1930's to two items: a national system of public employment exchanges and a nation-wide system of unemployment compensation programs. The two are very important and are necessary parts of any program for meeting a serious wave of unemployment. But, as previously indicated, both of these measures are ways of easing the impact of unemployment or of filling jobs more promptly. Neither offers anything positive in the way of a plan for creating work or encouraging the reemployment of idle persons. Up through mid-1948 there had been no opportunity to test our ability to apply our experience of the 1930's in combatting idleness; there was little reason to believe that such a situation could last indefinitely. The employment service and compensation plans in existence meant that any new emergency could be attacked from a somewhat more advanced point than the one from which we started in the 1930's. Thus, although some progress was made in the 1930's, the amount was quite inadequate in view of the fact that unemployment seems likely to remain, over any extended period of time, one of our most complex economic problems.

## Questions

1. When is a worker unemployed? Is it possible to determine definitely when a person is willing and able to work? Why or why not?
2. To what extent is unemployment an economic problem that can be met through the action of employers and/or unions? Why?
3. What courses of action can government undertake that will tend to create jobs and thus reduce the amount of unemployment?
4. Is it feasible for the government to undertake to guarantee the right to useful employment of those able and willing to work? Why or why not?
5. In *Bailey v. Drexel* the child labor tax was held by the Supreme Court to be invalid. In the *Steward Machine Company* case the federal tax that encouraged the states to enact unemployment compensation laws was held valid. Were there basic differences in the two issues?
6. The United States Employment Service has been under direct federal supervision and under state control. Which do you consider the more desirable? Why?

## CHAPTER XIX

### SOCIAL SECURITY: OLD AGE AND OTHER RISKS

#### The problem of dependent old age

The protections of the Social Security Act other than the unemployment compensation plans encouraged under it were not labor legislation in the sense embodying a strict application of the definition of labor legislation given at the beginning of this study. Under the provisions of the law, an attack is made on dependent old age and aid is offered in caring for the blind, for dependent children, crippled children, and to certain social services. However, since dependence in old age and problems of health and child welfare are more common among workers and their families than in the general public, some parts of the Social Security Act other than those affecting unemployment compensation should be examined.

There are a number of reasons why these problems, especially that of dependent old age, fall especially heavily on worker groups. First of all is the fact that the average worker's income is not large enough to permit him, even if he has the foresight, to save or otherwise make adequate provision for an extended period of idleness in old age. The annual wage of the average worker is not more than the amount necessary to provide a healthy and decent standard of living at the time that it is being earned. Another reason why workers are especially affected is the fact that those who work in mines, mills, factories, and construction enterprises tend to be less educated than other non-farm groups in our population; the result is a tendency toward less foresight, less thought of future needs. While foresight is not entirely a matter of education it is probable that there is considerable correlation. There is still another reason for noting attacks on old age insecurity in a survey of labor legislation. As workers get older, they tend to become more nearly marginal members of the labor force. Thus, when there are more persons available for work than there are jobs available, older persons are likely to feel the situation more severely than younger groups. This statement will not be so true of skilled and professional persons as of the unskilled and semi-skilled manual workers. The former groups are able to replace physical stamina with more knowledge and skill as they grow older; consequently, they may not

become marginal workers in the labor market as quickly. However, advancing age makes those who have only manual dexterity and physical strength to sell much less desirable, and sooner or later forces them into the submarginal group.<sup>1</sup> Here, again, the worker and his family have a particular interest in programs for old age security.

Even before the depression peak of mass employment had been reached the problem of old age dependency was an important one. In 1930 it was estimated by the Bureau of the Census that there were slightly over six and one-half million persons in the nation who were sixty-five years of age or older.<sup>2</sup> Of this number, it was estimated that perhaps 1,900,000 had no property, 2,400,000 no earnings. Thus, according to this estimate, at least one-third were destitute.<sup>3</sup> The number of aged persons increased; by 1935 there were seven and one-half million or more persons who were over sixty-five years of age.<sup>4</sup> Of this number, the Committee on Economic Security estimated that at least one-half were dependent upon others for support. The aid came primarily from friends and relatives, many not financially able to contribute to the support of others.<sup>5</sup>

At least one other reason for government action to provide old age security should be noted. The proportion of our population that is sixty-five years of age or older is steadily increasing and will continue to do so for many years. In 1920 there were fewer than five million persons in that age group; by 1930 it had reached six and one-half million, and by 1940 about nine million. The census of 1950 probably will show nearly eleven million in this age group, and the number will continue to increase.<sup>6</sup> The percentage of aged in the total population also is increasing; it was less than three per cent in 1920, about five and one-half per cent in 1930, and nearly six and one-half in 1940. Estimates are that it will be seven and one-half per cent or more in 1950 and will continue to rise until it reaches twelve and one-half per cent by 2000.

Thus, lowered birth rates and longer life expectancy complicate

<sup>1</sup> This situation is more likely to manifest itself in the ability to get a new job than to keep one. However, in any case, advancing age is a particular problem to those who have no special skill or "know-how" to offer to an employer.

<sup>2</sup> Fifteenth Census of the United States: 1930, Population Bulletin, Composition and Characteristics of the Population, p. 9. Washington, D. C.: U. S. Government Printing Office, 1931.

<sup>3</sup> Rubinow, I. M., "Old Age." *Encyclopedia of the Social Sciences*, Vol. XI, p. 456. New York: The Macmillan Co., 1933.

<sup>4</sup> The number was approximately 9,000,000 in 1940, according to the census. Interpolating between the 1930 and 1940 figures indicates a figure somewhat in excess of seven and one-half million for 1935.

<sup>5</sup> *Report to the President of the Committee on Economic Security*, p. 24. Washington, D. C.: U. S. Government Printing Office, 1935.

<sup>6</sup> *Ibid.*, Table 13, p. 68.



the problem of old age insecurity. The greater number and proportions of aged persons makes the matter of caring for the indigent aged one that demands more and more attention and, if society fails to find a means of offering attractive employment, an increasing expenditure by society for relief.

#### Early old age pension plans

As has been noted, the movement for old age pensions by state and territorial governments had begun with Alaska in 1914. The movement progressed quite slowly; at the close of 1934 pension systems were in actual operation in twenty-five states and two territories. However, only eleven of the systems were in state-wide operation, the others having some counties that did not elect to care for their indigent aged in such a manner.

Even where there were state old age pension plans in existence there was no assurance that the problem of old age dependency was being adequately taken care of; the provisions of the plans varied widely. For example, the average monthly pension in North Dakota was \$0.69 in 1934. The highest average monthly allowance was \$26.08 in Massachusetts. Only six states paid pensions averaging over \$20 per month, while those in fifteen states averaged less than \$10.<sup>7</sup> In addition, the character and quality of administration varied widely.

There is at least one other objection to state pension laws as a means of providing for old age dependency. A pension has no element of a right to an income that has been purchased through contributions to some sort of fund. Rather it is a gift based on need. Although there should be no particular stigma attached to the receipt of support from a society that is unable to offer an opportunity for persons to earn a living, there is an element of discredit involved in the receipt of an old age pension. "Rum and laziness," it must be admitted, are the bases of some dependency in old age, but economic and social factors beyond the control of the individual probably are much more important causes. Nevertheless, our philosophy is such that most persons do not want to take a pension if they can avoid it. A much better method of caring for dependence in old age is through some widespread system of old age, retirement, and survivors' insurance. In such a plan, the contributions of the workers or workers and employers create an entirely different attitude toward the receipt of benefits, and the benefits are likely to be more nearly adequate.

Until the passage of the Social Security Act the provision of aid

<sup>7</sup> U. S. Bureau of Labor Statistics, Bulletin No. 616, *Handbook of Labor Statistics* (1936 edition), p. 601.

for non-working older persons was very inadequate. Many states had made no concerted attempt to meet the problem; several of those that did enact laws had been willing only to go through the motions, and in a majority of the cases had done a very unsatisfactory job. The Social Security Act did not bring a complete answer, but it made a long stride forward toward a realistic and intelligent program for meeting dependent old age.

### Old age and survivors' insurance under the Social Security Act

By far the most important old age dependency countermeasure included in the Social Security Act was the old age and survivors' insurance program. Since this part of the act was changed considerably in 1939, the provisions as they stood just prior to World War II will be noted. Essentially, prior to 1939 the act provided for retirement benefits; since that time it has provided retirement benefits and benefits to the dependents and survivors of an insured person. This protection has been made possible by the collection from employers and employees of a tax of one per cent on payrolls and on wages up to \$3000 per annum. The tax is nothing more than a forced contribution for the purchase from the federal government of an annuity payable on retirement or to survivors if certain conditions are met. Let us consider the law in greater detail.

As is true of all such legislation, there are many persons not covered by the law. In covered occupations, unlike the unemployment tax, it does apply to all employers of one or more persons. However, a number of occupations are exempt; these include agricultural labor, domestic labor, casual labor, government employment (foreign, federal, state, or local), service performed for other members of the immediate family, employment for a non-profit organization, and maritime service on non-American vessels when outside the United States. For persons engaged in other occupations for a specified period of time, and if they meet certain conditions that we must note, a retirement annuity should be available on their leaving the labor market at or after age sixty-five.

In order to qualify for benefits, certain taxes must be paid and a certain amount of income earned. As originally established, the law provided for a one per cent tax on employers and a similar levy on employees (on only the first \$3000 of annual wages paid by an employer to any one employee) from 1937 to 1940; from that year to 1943, 1.5 per cent; from 1943 to 1946, two per cent; from 1946 to 1949, 2.5 per cent; and thereafter, three per cent.<sup>8</sup> Such a plan

<sup>8</sup> For simply stated information on this part of the Social Security Act see: Social Security Board, "A Handbook on Federal Old-Age and Survivors Insurance." Washington, D. C.: U. S. Government Printing Office, 1941.

would have built up a large reserve fund, since the progression of taxes to three per cent from both employer and employee by 1949 would have brought in much more revenue than would have been necessary for the payment of benefits. Statisticians estimated that by 1980 the reserve might have been as great as \$47,000,000,000, since the system would not have reached its peak number of annuity recipients until that time. The reserve probably will never be built up, since the tax continued through 1948 as one per cent on each contributor. Presumably the plan is to continue on a pay-as-you-go basis, collecting now from younger persons to pay the benefits of retired or survivor claimants. When the present taxpayers retire, their benefits will come, not from reserves which they have helped to build, but from payments by other persons—young workers who are building for themselves a right to a retirement annuity with funds actually being paid out directly to others.

A claimant for retirement income must meet certain requirements as to previous employment. In order to be fully insured for life, he must have been employed in covered occupations long enough to have earned at least \$50 per quarter in a minimum of forty calendar quarters subsequent to January, 1937 (when the system went into operation). Between 1937 and the end of 1946, when 40 quarters had elapsed, a person had to have earned the minimum amount in at least one-half of the quarters from 1937 to age sixty-five, with a minimum of six quarters if that age were attained before July, 1940; this prescribed minimum number of quarters was increased by one every six months, until it was fifteen quarters for those who were retiring late in 1944. Since that time it has been a matter of earning \$50 during one-half the quarters elapsed since January, 1937. After 1956 the only significant provision will be the required forty quarters for full insurance upon retirement.<sup>9</sup> It should be kept in mind that only quarters worked since the law became operative and only those in which at least \$50 was earned in a covered occupation serve to satisfy the requirements.<sup>10</sup>

The benefits to which a person is entitled under the old age and survivors' insurance plan are dependent on the average earnings while engaged in covered employments and the length of time spent

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<sup>9</sup> This will not be true of survivors' insurance for younger workers whose death leaves dependents who can qualify for benefits. For these persons the requirement will continue to be minimum earnings of \$50 per quarter in at least half the quarters from January, 1937, or age twenty-one, whichever came later, with a minimum of six quarters.

<sup>10</sup> A widow and children are eligible for benefits if the deceased was either currently insured or fully insured at the time of death. To be currently insured the worker must have received at least \$50 in wages from covered occupations in six or more quarters out of the twelve immediately preceding the one in which he died.

in such occupations. To compute the average monthly wage, the total wages earned by the worker in covered occupations after January, 1937, are divided by the total number of months in that same period of time, including any periods in which he was not engaged in a covered occupation. Thus, if a person has spent considerable periods of time in non-covered occupations, his average wage would be sharply lower, since those periods of time would have to be used in computing the average although the earnings therefor could not be. For an employee who reached age twenty-two after the law went into effect, any wages earned in covered occupations after January, 1937, are included in the calculation, but the months of any quarter before age twenty-two in which he was paid less than \$50 are excluded.

After the average monthly wage is computed, the monthly primary benefit of the claimant can be derived. This is done by (a) taking forty per cent of the first \$50 of the average monthly wage, (b) taking ten per cent of the remainder (\$250 per month or \$3000 per annum is the top figure that may be used), (c) adding the results of steps (a) and (b) and taking one per cent of that total and multiplying it by the number of years in which at least \$200 has been earned in a covered occupation, and (d) figuring the sum of the three steps above. For example, if a worker had an average monthly wage of \$200 for a period of 15 years coverage, his primary benefit would be computed as follows: forty per cent of \$50 is \$20; ten per cent of the remaining \$150 is \$15. Adding the two gives \$35, to which we add fifteen per cent of \$35, or \$5.25. A sum of the \$35 and \$5.25 indicates a total primary benefit of \$40.25 per month. In no case is the monthly benefit to be less than \$10 or more than \$85, regardless of the sum computed.<sup>11</sup>

In 1939 the law was modified so that additional benefits were allowable to persons with wives and dependent children and certain benefits were provided for dependents who survive an insured person. Since the dependent and survivor benefits are based on the primary benefits, it is well to examine them now. The primary benefit is that due on retirement, at age sixty-five or thereafter. The monthly addition granted for a wife, drawn only at age sixty-five and thereafter, is 50 per cent of the primary benefit; the addition for a dependent child (one under age 18 and unmarried) is also one-half the primary benefit. Similarly, fifty per cent of the primary benefit

<sup>11</sup> This method of computation is entirely different from that which was written into the original law. In the original the benefits were computed on the basis of the total wages earned with no consideration given to length of service. The present formula is one written into the law in 1939. The original method is not included here since it has no current value.

of the deceased is payable to a surviving parent over sixty-five, but only if the parent was chiefly dependent on the deceased and the deceased left neither widow nor child or, in case the deceased did leave a widow or child, only if the widow or child is not entitled to benefits.

Survivors of a fully insured person are also eligible for payments based on the primary benefit of the deceased. A widow is eligible either if she is over age sixty-five or if she has unmarried children under eighteen who are dependent. Under either of the above conditions a widow can draw three-fourths of the primary benefit. also, surviving dependent children under eighteen are entitled to a survivor benefit of one-half the primary amount. In no case are the benefits to a family group derived from one worker's insurance account to exceed the smallest of the following three amounts: (a) twice the amount of the worker's primary benefit, (b) 80 per cent of his average monthly wage, or (c) \$85.

As an illustration of dependent and survivor benefits, let us calculate the amount that might have been available to dependents or survivors of the worker whose primary benefit was computed previously. He had averaged \$200 per month in a covered occupation and had worked at it fifteen years before retirement; his primary benefit was \$40.25. After his retirement the wife would be entitled, when she reached age sixty-five, to a benefit of \$20.13; together they would receive \$60.38 per month. If there were a dependent child, one-half benefit, \$20.13, would be payable in addition. If the wife had not reached age sixty-five or the child were beyond eighteen, only the primary benefit of the worker would be paid.

If the worker died with the above monthly annuity payments due to him, the following survivor benefits could be paid. The widow, over sixty-five or irrespective of age if she had dependent children, would be eligible for a monthly benefit of \$30.19, three-fourths of the basic monthly benefit. Each dependent child would be eligible for a payment of \$20.13; a like amount would be payable to each dependent parent over age sixty-five, but only, as stated previously, if the parent was chiefly dependent on the deceased and the latter left neither widow nor child or, in case the deceased did leave a widow or child, only if neither is entitled to benefits. But no combination of retirement and dependent or survivors' benefits based on the earnings of one person may exceed \$85 or the other limits noted above.

To summarize eligibility for benefits, once a worker has worked the required number of quarters, he and his dependents or survivors are eligible for benefits only if they meet certain conditions. The worker must have reached age sixty-five and retired before he can

draw benefits. There is no provision in the Social Security Act for retirement, even when disabled, prior to an age of sixty-five years. Nor can a person of sixty-five receive the benefit without retirement from covered work. Receipt of \$15 or more monthly as wages from covered employment disqualifies the claimant for benefits; however, any amount of earnings is allowed without disqualification if it comes from self-employment or non-covered work. Dependents or survivors are eligible for benefits only when over age sixty-five or under age eighteen. The single exception to this condition is the surviving widow under sixty-five with a dependent child or children; such a person can draw her regular survivors' benefit of seventy-five per cent until the children have reached eighteen, married, died, or otherwise become non-dependent. And when the last child reaches eighteen or otherwise becomes disqualified the widow becomes ineligible until she reaches age sixty-five. Remarriage automatically disqualifies a widow or parent, as does marriage a dependent child under eighteen.

All monthly benefits awarded to a retired worker are regularly payable from retirement until death unless the insured begins earning as much as \$15 per month in a covered occupation, in which case benefits stop in those months when the excess amounts are earned. Benefits payable to dependent children are payable until age eighteen or marriage or adoption. Survivors' benefits for a widow or parents are payable until death or remarriage.

Lump-sum death payments can be made, under certain rather restricted conditions, to relatives or even to friends paying burial expenses. Such payments are permitted in case the deceased worker was either currently or fully insured at death. If that be the case and there is no widow, child, or parent who can qualify upon application for a monthly benefit, then the lump sum is payable provided claim is made for it within two years of the death of the insured person.

Any benefits due under the old age and survivors' insurance program are available as a right for which the contributions of the worker and his employer or employers<sup>12</sup> have paid. Nevertheless, the benefits are not automatically payable. The worker or his survivors must file a claim for benefits. In filing, there is no necessity of proving a need for the benefit because it is rightfully due to the worker. However, if a claim is never filed by the eligible claimant,

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<sup>12</sup> Many persons work for a number of different employers who are in covered occupations. Since a worker on his first covered job is assigned a social security number that he keeps throughout his life, unless it is changed for some reason, and since all of his contributions and those of his employers are credited to his account number, various employments are not a serious problem.

no benefits are ever paid. Separate blanks are to be filed by the retired worker, his wife, children, parents, or widow. Still another blank is provided for application for lump-sum death payment. Considerable administrative routine is prescribed concerning the completion of forms and the proof to be filed in support of statements.

Under the old age and survivors' insurance program, the worker is given no choice as to whether he is to be covered; the nature of the occupation in which he is engaged determines that matter. However, it is up to the worker or survivor whether or not benefit claims are filed. Because no test of resources is involved and the benefits are a matter of right for those who can qualify, it is probable that relatively few claims are left unfiled. From the time of the earliest payments the number of regular benefits has increased steadily. By the end of 1946 over 900,000 persons were receiving retirement benefits and 700,000, survivors' benefits. Barring unforeseen economic or legislative shifts, these figures are likely to rise steadily for a score of years or more.

At the same time that the number of benefits paid was increasing, the number of persons building up credits under the Old Age and Survivors' Insurance Program was increasing. Between 1940 and mid-year 1946 the number of living account-number holders grew from approximately 50,000,000 persons to slightly more than 76,000,000. Not all holders of account numbers are at work at any one time, of course, but the number of workers receiving taxable wages showed a similar sharp jump in successive years. During 1937 almost 33,000,000 persons drew taxable wages. In 1945 this number was greater than 46,000,000. These increases furnish the basis for larger numbers of benefit claims in future years.

Establishment of a system of contributory old age grants will not fill entirely the need for old age security. For administrative or political reasons or both it was impractical when the Social Security Act was passed to try to cover all persons who would be in need of assistance in old age. In addition, this contributory system does not meet the needs of dependent old persons, of others leaving the labor market soon after the passage of the act, and of the self-employed no matter when they cease gainful employment. Also there are non-covered persons who are incapacitated or for some similar reason are not employed. A well-rounded program designed to combat old age dependency must include a measure to aid needy persons who cannot reap the benefits of a contributory plan.

#### Current old age pension plans

The Congress was unwilling to embark upon a national system of pensions for the aged when the Social Security Act was passed. But

the failure of many states to develop programs offering adequate protection for their dependent aged showed that some federal action was necessary in order to encourage the states to make reasonable provisions for older persons unable to support themselves. Therefore, the old age assistance provisions of the Social Security Act offered financial assistance to the states that were unwilling to establish relatively adequate pension plans.

Provisions of the act offered to give to the states with acceptable pension laws one-half of the amount of the pension paid in each case, up to a maximum federal contribution of \$20. This maximum was changed in 1946 to \$25.<sup>13</sup> However,<sup>14</sup> in respect to quarters, beginning October 1, 1948, state will receive \$15 of the first \$20 paid to a needy aged person, plus fifty per cent of the amount paid in excess of \$20, but with a maximum monthly payment (combined federal and state) of \$50. The act in no way limits the amount of the state grant, but most states only match the federal grant because that is all that is necessary to receive the federal aid. In addition to encouraging more adequate pension programs, the federal law is directed at keeping as many old persons as possible in their homes rather than in country farms and poorhouses.

In order to qualify for the federal aid, state laws must be approved by the Social Security Administration. This approval is granted only if a number of standards specified in the law are met or surpassed. According to some of these, the state plan must: (1) be in effect in all political subdivisions of the state, and, if administered by them, be mandatory upon them; (2) provide for financial participation by the state; (3) designate a single state agency to administer or supervise the administration of the plan; (4) provide that persons denied old age assistance be given an opportunity for a fair hearing before such an agency; (5) provide methods of administration and selection of personnel that promise efficient operation of the plan; (6) provide for the making of reports needed by the federal Security Agency; (7) provide that the state agency shall in determining need take into consideration any other income and resources of the individual; (8) restrict the disclosure of information concerning applicants and recipients to purposes directly connected with the administration of old age assistance; (9) make no minimum age requirement of more than sixty-five years; (10) make no residence requirement in excess of five years out of the nine imme-

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<sup>13</sup> This change in maximum federal grant resulted from the grant of \$10 federal money for the first \$5 of state contribution. Thereafter, the federal government matched the state contribution up to \$25 federal grant per case.

<sup>14</sup> This change was made by Public Law 642, passed over the President's veto, June 14, 1948.



diately preceding the application; and (11) make no citizenship requirement that excludes any citizen of the United States.

In addition to the grants made to the states for pensions as outlined above, the federal government gives to each state five per cent of the total amount granted for pensions or old age assistance. This latter sum may be used to pay for administering the state plan or for old age assistance grants or both. Whereas only half of the states had established old age pension laws prior to the enactment of the Social Security Act, all saw fit to do so thereafter.

Payments made under the old age assistance program are based on need. In order to qualify for a pension under this plan, the applicant must convince an investigator that he or she has no income or resources from which to provide self-support. If there is any income from property, contributions from the family, or other sources, these are considered by the public assistance officer in the determination of need, along with estimated requirements for food, clothing, medical care, housing, or other necessities. On the basis of these needs and income or resources if any, a final estimate is made of the amount to be granted by the state. The amount need not be the same for all pensions. It should be noted that under this plan of assistance there are no exceptions for various employments, size of the firm, the income, total previous earnings, or anything of that nature. The sole question is that of the needs of aged persons which cannot be met by other programs or plans.

#### Other grants allowable under the Social Security Act

Under the Social Security Act, the federal government provides aid for the needy blind under much the same conditions as for the aged. Payments for blind persons unable to support themselves are again made on the basis of estimated need. If the federal Security Administration approves the state plan of giving pensions to the blind, it will make grants in aid in the same amounts and under the same conditions as in the case of the needy aged.

Another section of the act sets up a similar plan of aid for dependent children. In general, a dependent child is one living in a broken home with either no parental support or not enough to maintain the family as a unit. In order to keep the children in their home or perhaps that of relatives rather than having them sent to a public institution, the federal government gives financial aid to the states. Grants are made on the basis of estimated needs. The United States will pay to states \$9 of the first \$12 paid to a dependent child, plus fifty per cent of the amount over \$12, up to \$27 for the first and up to \$18 for each additional dependent child.

These grants should not be confused with those made to surviving

mothers and children under the Old Age and Survivors' Insurance program. Under that plan, the contributions are dependent on earnings of the deceased husband and father. Of course they are likely to be needed, but the survivors' grants can be secured without any proof of need.

In addition to the already noted sections of the Social Security Act, there are provisions for federal participation in a number of welfare services. These are so far removed from the general field of labor legislation that they will only be named here. Included are (1) maternal and child health services, (2) services for crippled children, and (3) child welfare services. In all of these fields of action federal grants are made for the purpose of aiding in the conduct of approved services.

The Old Age and Survivors' Insurance program, which is entirely federal in nature, the federally induced state plans for unemployment compensation, and the federally aided systems of aid for the needy aged, blind, dependent children, and for certain welfare services are the sum of the efforts by the federal government to provide social security for workers in the general economy. Other plans have been put into effect by the federal government for its own employees and for workers on interstate railways. This much development is highly commendable. Certainly the situation is much better than it was when the nation entered the depression of the 1930's. In view of the fact that social changes come very slowly and that there usually is much opposition to such changes, the progress made has been rapid. However, the nation is not faced with the same situation as it was when much of the program was begun. Needs change as does what constitutes adequate social protection. There have been modifications in the federal and in many of the state laws, but there is the same problem that has arisen in every instance of government regulation or control: modifications come slowly, and only after the need has long been apparent.

#### Constitutionality of old age and survivors' insurance

Like unemployment insurance and almost any significant piece of legislation, the old age and survivors' insurance program had to undergo the scrutiny of the Supreme Court before its way was clear. The background of the test case<sup>15</sup> is somewhat unusual; a suit was brought by a shareholder of the Edison Electric Illuminating Company of Boston asking an injunction to restrain the company from paying the taxes for old age assistance. The company was willing to pay the tax and indicated that it would do so unless restrained by

<sup>15</sup> *Helvering, Commissioner of Internal Revenue, et al. v. Davis*, 301 U. S. 619 (1937).

the court order. The district court in which the suit was brought refused the injunction and dismissed the case. In so doing, the judge held that the tax on employees was not properly a matter to be challenged by the stockholder.

On appeal, the Circuit Court of Appeals, in a two-to-one decision, reversed the judgment of the lower court. The majority of the court held that the old age retirement benefits provided under Title II of the act were a violation of the tenth amendment, which reserved certain powers to the state. The majority was also of the opinion that the tax called for by Title VIII was not an excise in the sense intended by the Constitution. From this decision the case was carried to the Supreme Court for a final ruling on the validity of the federal old age assistance program. The ruling was rendered on the same day as the Steward Machine and Carmichael decisions.

In arguing the suit before the Supreme Court, the counsel for the stockholder made much of the argument, agreed to by the majority of the Circuit Court, that the tax on employment was not an excise of the type that was sanctioned by the Constitution. Quotations and definitions from sources dating back as far as Adam Smith's *The Wealth of Nations* and citing the type of excises used at other times in our history were used to try to disprove the validity of the measure. In addition, it was pointed out that the exemptions in the law were such that only about fifty-six per cent of the working population was covered. It was argued, and with some reason, that such widespread exemptions made the plan an unreasonable and inadequate one.

The arguments were not convincing, however, to the majority of the Court. On the major contention that the attempt of the federal government to provide a system of old age and survivors' insurance was not expenditure for the general welfare and was a violation of the tenth amendment, the Court denial contained a number of interesting comments. It was held that:

"Congress may spend money for the 'general welfare' . . . the line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground . . . in which discretion is at large. The discretion, however, is not confided to the courts. The discretion belongs to Congress unless the choice is . . . a display of arbitrary power."

Thus the Court sanctioned as constitutional the spending of federal moneys for old age and survivors' benefits. At the same time they refused to overrule Congress on what was or was not in the gen-

eral welfare. And, as they pointed out, the concept of general welfare is not static and concepts a century old are not controlling.

Recognizing that the old age assistance program was a part of a broad attack on the problem of unemployment, the Court stated that "unemployment is an ill not particular but general, which may be checked if Congress so determines, by the resources of the nation." As to the extent of the problem and the efficiency of separate action by the states, the Court said, "The problem is plainly national in area and dimensions. Moreover, laws of the separate states cannot deal with it effectively. Congress at least had a basis for that belief."

As to the validity of the tax as an excise sanctioned by constitutional provision, the Court ruled on the issue without discussion. In the opinion of the majority, it was valid excise and the exceptions made did not alter that fact. Therefore, the benefits provided under the old age retirement plan and the tax collected in conjunction with it were both approved. A long step forward in social progress had been taken.

#### Retirement legislation for railroad workers

The Congress did not extend the provisions of old age and survivors' insurance to railroad employees under the Social Security Act. Rather, as with labor relations and unemployment compensation, they enacted special legislation to apply to that group. In 1934, prior to the Social Security Act, the first Railroad Retirement Act was created.<sup>16</sup> This law applied to all railroad, express, and Pullman employees; for them retirement was required at sixty-five years of age, with extension of work time to age seventy permitted under agreement. The amount of the benefits provided was based on earnings and length of service; they were financed by a tax of two per cent on the employees' wages and a tax of four per cent on the employers' payroll.

The act was challenged in the courts at the first opportunity by the companies affected.<sup>17</sup> It was argued that the regulation was not reasonably connected with the control of interstate commerce, and that it therefore was not within the powers of Congress. A number of other criticisms were offered, one of which was that the pooling of all funds collected was a violation of the due process clause because it discriminated against employers with the better employment records.

At the time that the case came before the Court it still was pursu-

<sup>16</sup> 48 Stat. 1283, 1934.

<sup>17</sup> *Railroad Retirement Board v. Alton Railroad Company*, 295 U. S. 330 (1935).

ing a very conservative course. Economic conditions and the threat of presidential action to add members to the Court had not yet made any imprint on the thinking of the Justices. Mr. Justice Roberts spoke for the Court, stating the opinion of a bare five-man majority that the law in question was invalid. He stressed the point that, despite the importance of their function to the public, the railroads were privately owned and there were limits on the extent of regulations to which they could be subjected. As the court majority saw the issue, the provision of pensions was "remote from any regulation of commerce as such." The attempted action clearly lay "outside the orbit of Congressional power."

The majority also agreed that the act violated the due process clause. "We conclude that the provisions of the act which disregard the private and separate ownership of the several respondents, treat them as a single employer, and pool all their assets regardless of their individual obligations and the varying conditions found in their respective enterprises cannot be justified as consistent with due process." In addition, the majority objected to the provisions of the act that would have paid pensions to persons no longer employed on the railroads.

Chief Justice Hughes and three others dissented. Essentially, the divergence of opinion came from conflicting sets of social and economic values. That is, the dissenters felt that the previously sanctioned legislation enhancing the opportunity of injured railway workers to receive compensation was a valid precedent for pensions. Both situations were instances of government action to compensate or set the stage for compensating for "human wastage." Nor was the pooling provision invalid in the mind of the Chief Justice; he felt that pooling arrangements in state compensation laws that had been approved were adequate precedent for approving the pooling provided by the Retirement Act. Finally, the dissenters denied pointedly that the establishment of retirement pensions was outside the powers of Congress. That body could treat the railroads of the country as a group for purposes of regulation so long as particular properties were not confiscated.

Congress did not take the opinion of the Court as the final answer regarding railroad employee pensions. In August, 1935, it enacted two pieces of legislation to replace the one which had been disallowed.<sup>18</sup> One of these created a new system of pensions for retired railroad employees based on the power of Congress to appropriate and spend funds for the general welfare. Its companion piece levied excise taxes on the carriers and on the income of employees

<sup>18</sup> Public Law 399 and Public Law 400; 74th Congress, 1st Session; approved August 29, 1935, 49 Stat. 967 and 49 Stat. 974.

in order to finance the pensions; however, no direct connection was made between the pensions and the tax. The tax was 3.5 per cent on wages and payrolls, up to \$300 per month for any one person. The benefits of the retirement plan were somewhat different from those of the act of 1934, but since the law was modified so quickly they need not be examined here.

This law did not reach the Supreme Court; however, the Alton Railroad again became a party to a test case that was ruled upon by the Federal District Court for the District of Columbia in 1936.<sup>19</sup> In the decisions and a subsequent oral clarification, the latter seemingly negating parts of the former, it was held that the tax levied but not the retirement act was unconstitutional; this statement hardly agrees with a passage in the decision that declared, "It necessarily follows that the two acts are inseparable parts of a whole." Even though there was conflict in the two statements of the judge, the Railroad Retirement Board acted on the oral clarification and began paying retirement annuities in July, 1936.<sup>20</sup>

In view of the somewhat beclouded situation with regard to pensions for railroad employees, President Roosevelt suggested in January, 1937, that employers and employees confer in order to work out a mutually agreeable plan for such pensions that could be substituted for the 1935 enactment. Acting on this request, the parties agreed to meet, and in March, 1937, they announced a plan which they proposed as a legislative substitute for the existing plan.<sup>21</sup> This proposal, with some modifications by Congress, was enacted into law in June, 1937.<sup>22</sup> A separate enactment was again passed levying taxes on employers and employees that would offset the expenses resulting from the retirement pensions.<sup>23</sup>

The retirement act is different in one important respect from the old age and survivors' insurance provision of the Social Security Act; it provides benefits for disabled persons who fulfill minimum service requirements even though the disabled person is not at retirement age. Under the law, railroad workers may retire at sixty-five years of age or later regardless of years of service, between sixty and sixty-five with thirty years service but with a deduction for each month that a male is under age sixty-five, when totally disabled at any age once they have completed 10 years service, between sixty and sixty-five if disabled for regular railroad occupation,

<sup>19</sup> *Alton Railroad Co. et al. v. Railroad Retirement Board, et al.*, 16 Fed. Sup. 955 (1936).

<sup>20</sup> See *Monthly Labor Review*, August, 1936, Vol. 43, No. 2, pp. 328-330 for a review of the case and subsequent action.

<sup>21</sup> *Monthly Labor Review*, May, 1937, Vol. 44, No. 5, pp. 1126-1127.

<sup>22</sup> 50 Stat. 307.

<sup>23</sup> Public Law 174; 75th Congress, 1st Session; Approved June 29, 1937.

and regardless of age if disabled for regular railroad occupation and having completed twenty years of service. Although there is no maximum benefit stated under the law, methods of computing benefits have made \$120 per month the maximum until after 1966. Survivors' benefits are paid under much the same conditions as old age and survivors' insurance. However, no additional allowances are made for dependents during the life of the retired person. The benefits payable to the retired worker tend to be somewhat higher than under old age and survivors' insurance. In addition, the provision of disability benefits is a significant improvement.

Although the Supreme Court had approved old age and survivors' insurance in 1938, the payment of the tax involved in the new law was tested in the Supreme Court in the same year.<sup>24</sup> The case was brought by the state of California. It owned the State Belt Railroad in the dock and shipping area of San Francisco, and, since it moved goods in interstate and foreign commerce, was held liable for the tax. The state sought an injunction restraining the Railroad Retirement Board and the Commissioner of Internal Revenue from collecting the tax. Justice Brandeis wrote the opinion of the Court denying the injunctive relief sought. According to the opinion, irreparable injury was not involved; the board could not enforce the provisions of the act except by legal proceedings. The Court felt that in any such case there was ample opportunity to be heard. Retirement benefits for railroad workers were finally a reality.

The past two chapters and Chapter X dealing with workmen's compensation laws cover the general field of social security legislation enacted in the United States. The story has its good and bad points; after a very tardy beginning, our progress has been relatively rapid. However, there are great gaps in the patchwork program that has evolved. Disability due to non-industrial sickness or accidents is untouched, and under programs like workmen's compensation, unemployment compensation, old age and survivors' insurance, and the various public assistance programs many persons are not protected in any way, the most commonly excluded groups being agricultural and domestic workers.

Even where groups are nominally covered there are wide differences in the adequacy of the social protection from one state or area to another. In general, the assistance given tends to fall far below any reasonable needs. In high prosperity the situation is not so bad. But there is no reason to think that a high degree of prosperity will continue indefinitely. If not, the measures that have been taken up to the end of 1947 will prove to be quite inadequate in the face of the hardship that will beset the public.

<sup>24</sup> *California v. Latimer et al.*, 305 U. S. 255 (1938).

## Questions

1. "The problem of dependent old age is only a special phase of the problem of unemployment." Evaluate this statement.
2. Would there be any advantage to building, under old age and survivors' insurance, a reserve fund of forty or fifty billion dollars, as was first planned, or does a "pay-as-you-go" basis seem more desirable?
3. Is there need for both old age pension and old age and survivors' insurance plans in an adequate social security program? Why or why not?
4. What reasons are there for special retirement legislation for railroad workers? Do you consider the reasons adequate?
5. What are unions doing at the present that will influence the need for government programs for old age security? How extensive is the action? What is your evaluation of it?
6. Aside from pension plans and old age insurance programs, what actions can government undertake to help in meeting the problem of dependent old age?



## CHAPTER XX

### THE RAILWAY LABOR ACT

#### Significance of railway labor legislation

Since about 1890 the federal Congress has been experimenting with labor legislation designed to promote peaceful labor-management relations on the nation's railroads. These experiments were based on the assumption that congressional power over commerce between the states included the right to take any steps thought necessary to insure an uninterrupted flow of commerce. Obviously, work stoppages arising from labor-management disputes were threats to a continuing flow of commerce.

These railway labor laws are important for a number of reasons. Since dependable railway transportation is so essential to the public, any measure designed to protect it is important. Also, the history of railway labor legislation is a long one, so that there is more experience from which to learn in this field than in any other. To some extent the laws affecting railroad labor have served as prototypes for labor laws affecting the general public; and the failures have given some indication of that which is least likely to succeed when applied more widely.

Examples of railway labor measures that were adopted more widely are not hard to find. The guarantee of the right to organize in independent unions and to refuse to join a company union first appeared in the Railway Labor Act of 1926; later it was incorporated in Section 7 (a) of the National Industrial Recovery Act and still later in the National Labor Relations Act. The basic eight-hour day was granted to railroad workers by legislation in 1916; federal regulation of hours of work of non-railroad workers did not come until the 1930's, and even then the basic eight-hour day was not granted. As has been noted in the preceding chapter, retirement insurance was provided for railroad workers in 1934 and for general workers in 1935; the fact that the former ran afoul of court invalidation does not detract from the fact that the plan was tried first for them.

The fact that only Congress has power over interstate commerce is undisputed. However, many questions have arisen from time to time as to just what this power includes. One of the very knotty problems that has developed is the exact determination of the

boundary line between areas reserved for state and federal action.<sup>1</sup> While the province of federal action is not at all clear, it has been well understood for more than half a century that the states cannot interfere in any direct manner with the activity of the federal government in regulating commerce.<sup>2</sup> However, the clarification that has come is not sufficient to answer all questions that have arisen. For example, there is the perennial issue of what rights can be infringed by railway labor legislation and how far; that is, just how effective is the fifth amendment. Similarly, there is the question of precisely when a condition or practice interferes sufficiently with commerce to warrant federal control. In addition, problems arise as to how far the public importance that attaches to railroad transportation warrants special legislation and treatment of railway labor problems. Thus, while the general area of federal control has been sketched in by laws and court decisions, questions of application of principles still arise.

#### Early railway labor legislation

The first attempt at railway labor legislation by the federal Congress came in the Arbitration Act of 1888.<sup>3</sup> That measure provided for the investigation of railway labor disputes and for voluntary arbitration in cases where other efforts at settlement failed. The law remained on the statute books for ten years, however, and was, for all practical purposes, a dead letter. Arbitration, which was to be agreed to voluntarily and carried out by a panel of three impartial persons, was never used. The investigation provisions of the act were used in only one case: to study the Pullman Strike of 1894. Since the investigatory procedures were not a means of settling disputes and the provision for arbitration was never exercised, the Arbitration Act of 1888 was of little real importance.<sup>4</sup>

When it became clear that the act of 1888 was of no real significance, Congress repealed it and enacted in its stead the Erdman Act of 1898.<sup>5</sup> The new law dropped the investigatory features of the previous act, but included a provision for voluntary arbitration. The new arbitration provision did not require that the arbitrators be impartial; rather the panel was to be tripartite, with one member representing each party and the third chosen by the two or by other

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<sup>1</sup> This issue has gone far beyond the direct regulation of the movement of goods across state lines. The federal Congress has extended the commerce power very far by claiming now, with court sanction, the power to regulate that which may have an effect on interstate commerce.

<sup>2</sup> For a brief discussion of issues and cases involved see: *Prentice-Hall Labor Course*.

<sup>3</sup> 25 Stat. 501.

<sup>4</sup> Kaltenborn, H. S., *op. cit.*, p. 37. See also: *Prentice-Hall Labor Course*.

<sup>5</sup> 30 Stat. 424.

arrangement if the two failed to agree. In addition, the law contained for the first time in this country a provision for mediation under certain circumstances; it stated that the Commissioner of Labor or the Chairman of the Interstate Commerce Commission could offer his services in helping to settle the dispute when requested by either party to do so. However, the efforts to mediate could be used only in disputes over wages, hours, and working conditions.

The functioning of the Erdman Act showed clearly the relatively ready acceptance of mediation as a means by which the government could aid in the settlement of labor-management disputes. The practice, begun on a small scale with the passage of the Erdman Act, has remained the backbone of government attempts to settle disputes. The first attempt at mediation was unsuccessful; shortly after the law was enacted the trainmen asked for help in settling a dispute in the Pittsburgh area centering around a wage issue. The railroads involved refused to cooperate, however; to them the question of wages was of such importance that it was a problem to be decided without any outside interference.<sup>6</sup> Although mediation does not enable an outsider to decide any issues, but only to act to encourage the disputing parties to meet on some middle ground, the refusal is not surprising in view of the general attitude of business toward government at the time.

With the failure of this first effort, no further use of the dispute-settling services provided under the act was made until 1906. Between that year and 1913, when the Erdman Act was replaced, sixty-one cases were dealt with under the law. Of these, roughly one-half were settled by mediation and arbitration. Only about ten per cent of the cases were closed by arbitration alone.<sup>7</sup>

Along with making the first provision for mediation, the Erdman Act is of interest and significance because of another original attempt at a certain type of regulation. Section 10 of the act, in part, forbade any employer or his agent to "require any employee or any person seeking employment as a condition of such employment, to enter into an agreement, either written or verbal, not to become or remain a member of any labor corporation, association, or organization." There was more to the prohibition, but in its entirety it amounted to an attempt to outlaw yellow-dog contracts on the railroads. This section was tested before the federal Supreme Court,<sup>8</sup> the question being whether the prohibition contained in Section 10 of the act was a violation of the fifth amendment to the Constitution. As the Court saw the question, the prohibition was "an inva-

<sup>6</sup> Kaltenborn, H. S., *op. cit.*, p. 39.

<sup>7</sup> *Prentice-Hall Labor Course*.

<sup>8</sup> *Adair v. United States*, 208 U. S. 161 (1908).

sion of the personal liberty, as well as of the right of property, guaranteed by that Amendment. Such liberty and right embraces the right to make contracts for the purchase of labor of others and equally the right to make contracts for the sale of one's own labor." The Court did not evaluate the relative economic freedom of which they made so much. Two dissenting opinions were delivered. The one by Mr. Justice Holmes stressed a valid point that he was to make at a later date in other dissents. In his opinion, the section in question "does not require the carriers to employ any one. It does not forbid them to refuse to employ any one, for any reason they deem good. . . . The section simply prohibits the more powerful party to extract certain undertakings, or to threaten dismissal or unjustly discriminate on certain grounds against those already employed." The point made by Justice Holmes was one which should have been apparent to anyone: an anti-discrimination law, whether it be directed at discrimination against union members, against racial minorities, religious groups, or others, is in itself an attempt to protect a weaker party that is unable to stand against certain discriminatory practices. If the parties were relatively equal in bargaining power, one could not act in a discriminatory manner against the other. Therefore, an anti-discrimination law takes away no rights but merely deprives the stronger party of the ability to exercise its strength in a discriminatory manner. Such an intervention is thoroughly in keeping with the idea of democracy.

The Erdman Act was important as a trail-blazing experiment rather than for its real accomplishments. It brought the first instances of mediation or arbitration of labor disputes by representatives of the federal government. It also demonstrated clearly the preference of industry for mediation rather than arbitration, a preference which has continued throughout the first half of the twentieth century. In addition, the act contained the first attempt by the federal Congress to protect the right of workers to join unions if they so desired. The attempt was unsuccessful, but it served as a precedent for later efforts in the same direction. These efforts finally bore fruit in the form of court sanction in the 1930's.

In 1913 a dispute developed between the engineers and fifty-two eastern railroads over wages and working conditions. Bargaining failed and mediation was tried unsuccessfully. Both parties agreed to arbitrate but refused to utilize the three-man arbitration panel provided for in the act. Despite the law, a panel of seven was named, five public members being included. The panel, although capable, found itself unable to evolve an acceptable solution.<sup>9</sup> Al-

<sup>9</sup> Millis, H. A., and Montgomery, R. E., *op. cit.*, Vol. III, p. 732.

though an award was made and accepted by both parties, it was not satisfactory to either. The dissatisfaction led to conferences between union and carrier representatives and the National Civic Federation, at which a draft was prepared of a bill to correct some of the unsatisfactory provisions of the Erdman Act. The proposed bill was enacted in 1913 about as drawn by the groups that collaborated on it.

The resulting Newland Act of 1913 has been discussed earlier in this study,<sup>10</sup> as have the events leading up to the Adamson eight-hour law<sup>11</sup> and the operation of the roads by the federal government. During the period of government control the railroad unions and workers made much progress. They gained a basic eight-hour day, solidified their position in collective bargaining, received wage increases, and developed boards of railroad adjustment that were to be used more extensively at a later date. However, while some of the practices of the government were quite desirable, most of them were not adopted by the carriers at once when the roads were returned to them nor were they incorporated into the first railway labor legislation that was passed. However, most of the wartime practices have reappeared at a later date in federal controls.

The Esch-Cummins Act, or Transportation Act of 1920,<sup>12</sup> returned the railroads to the owners for private operation, with little use made of the lessons of the previous two years. Title III of the act contained the provisions for settlement of disputes between railway labor and management. Strangely, no attempt was made to provide any means of mediating disputes, although this type of action had proven to be the most effective form of government dispute-settling measures. Instead of mediation machinery, the act established a Railway Labor Board to be composed of nine members, representing equally workers, carriers, and the public. This board was empowered to "hear and decide" cases brought before it; although not authorized to mediate, it did attempt mediation in a few instances.<sup>13</sup> Prior to "hearing and deciding" on a case by the board, it was required that all disputes be subjected to collective bargaining and an effort be made by the parties to settle. In the final analysis, the deciding meant no more than recommending a settlement, since the decisions made were not enforceable.

One of the major omissions from the act was provision for the establishment of boards of adjustment such as had functioned rela-

<sup>10</sup> 38 Stat. 103. See Ch. IX for a discussion of railway labor controls during the war years.

<sup>11</sup> 39 Stat. 721.

<sup>12</sup> 41 Stat. 456.

<sup>13</sup> Kaltenborn, H. S., *op. cit.*, p. 47.

tively effectively during government operation. The act provided that boards could be set up if the carriers and unions so desired, but it did not make them mandatory. The carriers wanted a number of separate boards for the various companies, whereas the unions preferred national boards; as a consequence, little came of the provision permitting their establishment.

Another serious deficiency of the act was the failure to provide protection of the right of workers to join unions. The act required the carriers to confer with representatives of their workers and stopped there. It did not contain any prohibition against interference with the workers in the free choice of representatives. Coercive action to compel a worker to withdraw from some union or discontinue union activity or join a company union was within the law.

Failure to establish boards of adjustment threw a much heavier load on the Railroad Labor Board than would otherwise have been the case. Under these circumstances the board did yeoman service; it reported that by the end of 1925 it had disposed of more than 13,000 disputes. Of these, roughly forty per cent were of a local nature with limited coverage while sixty per cent were of a more general nature with broader coverage.<sup>14</sup> Even though the carriers and unions were required by law to exert every effort to settle grievances prior to submitting them to the board, it seems clear that too many cases were referred to it for settlement—many disputes should have been resolved by the parties involved. And, as previously noted, the rulings of the board were not binding and enforceable.

### The Railway Labor Act of 1926

Neither labor nor the carriers was well pleased with the act of 1920 and the derivative rulings. Both sides wished for a measure to take its place. Consequently, they engaged in a series of conferences in which they drew up a proposed new Railway Labor Act; their suggested bill was enacted in 1926 as the Railway Labor Act.<sup>15</sup> Many modifications of the act have been passed, but the Transportation Act of 1926 remains the basic railway labor law today. It is also of interest because many persons feel that parts of it would be of value in general labor laws. As of 1948, however, it applied only to railway and airline transportation. "Railway" is taken to include Pullman and express company employers.

The general purposes of the act, as stated, are as follows:

<sup>14</sup> Millis, H. A., and Montgomery, R. E., *op. cit.*, Vol. III, p. 736.

<sup>15</sup> 44 Stat. 577.

"(1) To avoid any interruptions to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitations upon freedom of association among employers or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreement covering rates of pay, rules or working conditions."

In essence, the act sought to avoid tie-ups of transportation that might come from a denial of the right of workers to organize or out of any dispute arising subsequent to organization. It was the first occasion during peacetime on which the government had sought to underwrite the right of any group of non-governmental employees to bargain collectively. The law was important as a forerunner of legislation that was enacted in the 1930's to extend the same right to other groups.<sup>16</sup> Its potential importance was great, since well-established and recognized unions encourage more stable and peaceful labor relations.

The act sought to make use of both mediation and arbitration to keep labor peace. It provided in the 1926 version for a five-man National Mediation Board to mediate disputes and encourage arbitration where mediation failed.<sup>17</sup> It could not arbitrate but could, when necessary, aid in the selection of arbitrators. In case of failure to bring about a settlement or achieve agreement to arbitrate, the new board had yet another action remaining. If the dispute threatened substantially to interrupt commerce between the states, the board could so notify the President, who in turn could name a special investigatory board to survey the dispute and make public its findings. During the investigation and for thirty days thereafter the conditions out of which the dispute arose could not be altered except by mutual agreement of the parties in the case.

The 1926 act again permitted the establishment of boards of adjustment if the parties agreed, but these were not required.<sup>18</sup> The intent that the carriers and unions set up the bipartisan boards was

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<sup>16</sup> Unlike the National Labor Relations Act, it specifically disallowed the closed shop. Even before the Taft-Hartley Law the closed shop was unlawful on the railroads; this was a desire of the railroad unions who feared that otherwise closed shop contracts would be signed with company unions to the independents' disadvantage.

<sup>17</sup> Modified in 1934; discussed later in this chapter.

<sup>18</sup> Although the 1926 version stated that boards of adjustment should be established, so much was left unsaid in the act that there was no way of forcing their establishment. Employer-union disagreement over the scope and coverage of the boards resulted in the formation of but a few.

clear, but without compulsion little was done about it. It has been estimated that some 300 system boards were established before 1934, but many important systems were without them and those in existence did not function well.<sup>19</sup> This meant that the National Board again carried a heavy load; the board ruled that it would hear only those cases appealed from a board of adjustment. With the relatively few such bodies formed, this meant that for many disputes there was no government machinery short of an emergency board to aid in settlement.

When dissolved in 1934, the Board of Mediation reported the handling of over 2500 cases. Its report showed a larger number of cases disposed of in each succeeding year. During its eight years of operation only two relatively unimportant strikes occurred on railroads and only ten emergency boards were appointed by the President.<sup>20</sup> Despite the apparently successful functioning of the board, railway labor began to object to the act in the 1930's. The amendments of 1934 were in part the result of this opposition. Although the 1934 amendments retained the broad outline of the act of 1926, the changes were broad and significant.

#### The amendments of 1934

The amendments of 1934<sup>21</sup> dissolved the five-man Board of Mediation and replaced it with a three-man National Mediation Board. A national Railroad Adjustment Board was also established that was a bipartisan body of thirty-six members, half of them representing and paid by management and half by the unions. The latter board was split into four divisions, each with specified jurisdictions to be noted later. Where the division with appropriate jurisdiction was unable to agree on the solution of some dispute before it, provision was made for an impartial "referee" to sit with the division and break the deadlock that had developed.

The sphere of authority of the new boards may be noted at this time. The highest body under the act is the National Mediation Board, composed of three members appointed for three-year terms expiring in successive years. The members are impartial representatives of the public, no more than two of whom may be from the same political party. The board is empowered to function in the following circumstances: (1) when either or both parties to a dispute invoke its services in (a) disputes concerning changes in rates of pay, rules, or working conditions, or (b) other disputes not refer-

<sup>19</sup> Millis, H. A., and Montgomery, R. E., *op. cit.*, Vol. III, p. 741.

<sup>20</sup> U. S. Bureau of Labor Statistics, Bulletin No. 616, *Handbook of Labor Statistics* (1936 edition), p. 20. Similar data reproduced in Kaltenborn, H. S., *op. cit.*, p. 49.

<sup>21</sup> 48 Stat. 1185.



able to the National Railroad Adjustment Board;<sup>22</sup> (2) to give its interpretation of the meaning or application of agreements reached under the act; (3) when efforts to mediate fail, to try to induce the parties to agree to arbitration. If they agree to arbitrate but are unable to name the impartial member or members, the board is to perform that function.<sup>23</sup>

The name of the National Mediation Board is an accurate one, unless the word "National" implies to those not acquainted with the board's work an ability to act in a broader field than railway labor. The board is a small impartial body that could as a last resort attempt the settlement of any railway or airline dispute that threatens an emergency. It is not an agency for enforcement of unacceptable settlements; rather it is a body to act as a go-between or compromiser to get the parties to settle or to agree to arbitration of final settlement.

Unlike the Mediation Board, the National Railroad Adjustment Board is a bipartisan body; its thirty-six members are appointed and paid by the carriers and the national railway labor organizations. Obviously, a board of thirty-six is too large to function as a body. For this reason the group is split up into four divisions, the first three with ten members each and the last with six; each has a separate type of labor dispute to settle. The jurisdictions of the divisions are as follows:

(1) Disputes involving train and yard-service employees, such as engineers, firemen, hostlers and outside hostlers' helpers, conductors, and trainmen.

(2) Disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, helpers and apprentices of the above groups, coach cleaners, powerhouse employees, and railroad-shop laborers.

(3) Disputes involving station, tower, and telegraph employees; train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signalmen, sleeping-car conductors, porters, and maids, and dining-car employees.

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<sup>22</sup> In both of these instances a prerequisite to board action is that the parties have been unable to adjust the dispute in conference. Parties are to give at least thirty-day notices of their desire to change any condition and to begin meetings promptly in an attempt to reach a new understanding. Also, even though the board's services are not requested it can "proffer its services in case any labor emergency is found to exist at any time."

<sup>23</sup> If mediation fails and arbitration is refused, the board is to notify both parties in writing that its mediatory efforts have failed. For thirty days thereafter, unless arbitration is agreed to or an emergency board is created, no changes shall be made in rates of pay, rules, working conditions, or established practices in effect prior to the dispute.

(4) Disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which the other divisions do not have jurisdiction.

Disputes are brought to the appropriate division of the Board of Adjustment only when they have been taken through all the steps of negotiation specified in the governing agreement. Then and only then may the board hear the case; as previously indicated, failure of the members of the board to agree brings in an impartial referee to break the deadlock. Awards by the several divisions of the board are made in writing and are final and binding on both parties.

Any issues not resolved by the machinery already outlined may be settled either by arbitration or by an emergency board; both of these procedures merit brief examination here. In the former case, the agreement is to submit to arbitration and accept the award as final and binding. However, refusal to submit to arbitration is not a violation of the act. Such arbitration may be by a three- or six-person panel, with equal representation of unions and carriers and the impartial party or parties chosen by representatives of the interested groups if possible. The only issues that can be arbitrated are those specified in the agreement to arbitrate.

The award by the arbitration panel and the evidence of the proceedings are filed with the federal district court for the district in which the controversy arose. An award so filed is conclusive unless one of the parties petitions to impeach it on one of the following grounds: (1) that the award does not conform to the act, (2) that the award does not confine itself to the stipulations of the agreement to arbitrate, or (3) that within the panel there was fraud or corruption which affected the result of the arbitration. If there is no such petition within ten days after the decision, the court enters judgment on the award; this is final and binding except for a condition for appeal that need not be examined here. Any question as to the application or meaning of an award is to be referred back to the arbitration board or a subcommittee thereof; such a matter of interpretation is handled in the same way as an original award.

If a dispute between a carrier and its employees cannot be settled by any of the boards or procedures outlined above, and if, in the judgment of the Mediation Board, it threatens a stoppage of transportation service that would create a national emergency, a final method of attempted settlement is provided. In such a case, the board is to notify the President of its opinion; thereafter the President is empowered, at his discretion, to create a special emergency board to investigate and report concerning the dispute. The report

and recommendations of the emergency board are not compulsory, but the hope has been that its investigation and report and the publicity given thereto would be sufficient to bring about a settlement. More than anything else it has been a means of using public opinion to bring the contestants to some settlement.

Once such a board is established, there is to be no change in working conditions during the time of its investigation and for thirty days after the report is made. However, by mutual agreement of the parties to the controversy, changes may be made of conditions out of which the dispute arose. Essentially, the appointment of such a board is a device to postpone for sixty days a threatened strike on the railroads while various pressures are extended to induce the parties to compromise their differences and continue operation of the railroads without interruption.

Although the 1926 act had included no penalty provisions, the 1934 version carries heavy penalties. Any carrier or its officers who wilfully refuse to observe the sections of the law guaranteeing the workers' right to bargain collectively may be fined not less than \$1000 and not more than \$20,000 or imprisoned up to six months, or both. This is the penalty for each offense; each day in which there is refusal to observe the law constitutes a separate offense. The penalties apparently are window dressing, since they have never been invoked.

### The Railway Labor Act before the Supreme Court

Before noting the manner in which the Railway Labor Act has worked out, at least two court cases testing the validity of the act should be noted. The first of these cases came before the Supreme Court in 1930<sup>24</sup> to test the validity of the provisions of the law that prohibited coercion or interference with the employees of a road in their choice of a union. The suit was brought into the federal district court by the union, which maintained that since its formation in 1918 it had been a representative of a majority of the railway clerks in the employ of the railroad. In 1925 the union asked for an increase in wages, which was denied by the company; the dispute was submitted to the Board of Mediation. While the case was pending before that body the company established a company union and sought to have its employees withdraw from the independent union and join the one fostered by the carrier.

The district court granted a temporary injunction against the company, which subsequently recognized the company union, the Association of Clerical Employees-Southern Pacific Lines, as repre-

<sup>24</sup> *Texas and New Orleans Railroad v. Brotherhood of Railroad Clerks*, 281 U. S. 548 (1930).

sentative of the clerical employees. The lower court then held the company guilty of contempt and directed that to purge themselves of contempt the company and its officers disestablish the company union and recognize the brotherhood as a bargaining representative until such time as the employees should by secret ballot choose their representative. The court also directed the rehiring of certain employees who had been dismissed. Punishment was prescribed in case the company did not purge itself of contempt.

In contesting the contempt finding before the Supreme Court, the company argued that the act of 1926 merely stated an abstract right and that it was not intended that it be enforced by legal proceedings. Furthermore, it was argued that in so far as the statute undertook to prevent either party from influencing the other in choice of representative it was unconstitutional. The free speech and liberty guaranteed by the first and fifth amendments were cited to bolster this contention.

In analyzing the case, the Court went into considerable detail concerning the reasons for the enactment of the 1926 law. It pointed out that no one was satisfied with the act of 1920 and that although Congress had sought to continue as much as possible the means for amicable settlement, it "thought it necessary to impose, and did impose, certain definite obligations enforceable by judicial proceedings." The question in debate was whether the prohibition of coercion in the selection of a representative was one of these enforceable obligations. In the opinion of the Court, this was answered in the affirmative because freedom of choice of representatives of both sides was essential to the purpose of the law.

Similarly, uncoerced action was essential to amicable settlement of differences, and "there is no impairment of the voluntary character of arrangements for the adjustment of disputes in the imposition of a legal obligation not to interfere with the free choice of those who are to make such adjustments. On the contrary, it is the essence of a voluntary scheme . . . that this liberty should be safeguarded."

It was also argued that the law interfered with the right of the carrier to select and discharge employees. This the Court denied flatly and with good logic:

"The Railway Labor Act of 1926 does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them. The statute is not aimed at this right of the employers, but at the interference with the right of employees to have representatives of their own choosing. As the carriers subject to the act have no constitutional right to interfere with the freedom of the employees in making

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their selections, they cannot complain of the statute on constitutional grounds."

Thus the act withstood its test of constitutionality. It was a case showing a grasp of problems of management-labor relations that was not to be extended to private employees other than on the railroads for some years. The enactment of the law and the court decisions both were previews of national policy and court attitude that were to be applied to most private employees almost a decade later.

The second case to be noted came before the Court in 1937.<sup>25</sup> Its background was in many ways similar to the Texas and New Orleans case. Following the failure of the shopmen's strike in 1922, some of the shop workers formed the Mechanical Department Association of the Virginian Railway, a union closely related to the company and with expenses paid by it. The company and the association promptly signed an agreement. Some years later, in 1927, the American Federation of Labor formed a local union among shop workers. After the 1934 revision of the Railway Labor Act giving the Mediation Board authority to conduct collective bargaining elections, this union demanded recognition as representative of shop craft employees.

The Mediation Board conducted an election and as a result of it certified the Federation as the accredited representative of six shop crafts—all the groups other than car men and coach cleaners. However, the carrier refused to deal with the Federation and tried to force its employees to stay out of that body; it also set up a new "independent" union among the shop workers. When the case was taken into the district court the company was directed to "treat with" the Federation and to "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes." Further, the court restrained the carrier from making an agreement concerning the shop workers with any other organization and from fostering any other union among these persons.

When carried to the Circuit Court of Appeals, that body approved the findings of the lower court and affirmed its decree. From that decision the carrier appealed to the Supreme Court. It insisted that the rulings of the lower courts were invalid for at least two reasons. One was that the requirement that a carrier bargain with an organization certified by the Mediation Board imposed no legally enforceable obligation. Secondly, it was urged that the regulation of relations with shop employees was not a regulation of interstate commerce and that it was a violation of the due process clause of the

<sup>25</sup> *Virginian Railway Company v. System Federation* #40, 300 U. S. 515 (1937).

fifth amendment. The carrier did not contest that part of the decree of the lower court that forbade any interference with free choice of representatives by employees since the Railway Clerks case of 1930 had established the validity of that requirement.

Mr. Justice Stone delivered the opinion of the Court, a decision which sanctioned the requirements of the act and the rulings of the lower courts. On the question of whether the act validly imposed a duty to treat with the appropriate representative as certified by the Mediation Board the Court held that it was "not open to doubt that Congress intended that this requirement be mandatory upon the railroad employer, and that its command, in a proper case, be enforced by the courts." This opinion was bolstered by reference to the fact that a prolific source of labor trouble was the unwillingness of employers to meet with representatives of workers to discuss and adjust grievances. In view of this, the Court argued, the Railway Labor Act had abandoned reliance on moral suasion to accomplish its purposes.

Once it was established that the law required the carrier to treat with representatives of the workers, the next problem was to determine what the term "treat with" included. The carrier argued that this meant only to meet with the representatives when and if it chose to negotiate with them. "Not so," said the Court. Although "the statute does not undertake to compel agreement between the employer and employees . . . it does command those preliminary steps without which no agreement can be reached." These preliminary steps included, as a minimum, meeting with representatives, listening to their complaints, and making reasonable efforts to compose differences. Furthermore, such an obligation carried with it the negative duty of not negotiating or entering agreements with non-designated groups.

With regard to the injunction granted by the lower court, the carrier argued that the controversy was not one in which equitable relief was appropriate. However, the Court disallowed this contention, leaning heavily on the fact that public interest required uninterrupted transportation. And to protect public well-being, "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."

Another question arose as to whether the "back shop" employees involved in this dispute had a relationship to interstate commerce sufficient to warrant control by federal legislation. After some review of the repair and service work done on the rolling stock of the carrier by the workers and of the fact that anything more than a temporary stoppage of this work would interrupt some or all of the



transportation service rendered, the Court held that there was a sufficient relationship.

Finally, there was the question of whether Section 2 of the act, prohibiting interference in the selection of representatives and requiring bargaining, was in conflict with the fifth amendment. The Court ruled in the negative: "The Fifth Amendment . . . is not a guarantee of untrammelled freedom of action and of contract. In the exercise of its power to regulate commerce, Congress can subject both to restraints not shown to be unreasonable." And, as a *coup de grâce*, "It seems plain that the command of the statute to negotiate for the settlement of labor disputes, given in the appropriate exercise of the commerce power, cannot be said to be so arbitrary or unreasonable as to infringe due process."

So the Railway Labor Act of 1926 and the revision of 1934 stood the test of court scrutiny. Management-labor disputes were recognized as causative of interruptions of interstate transportation and, therefore, properly subject to federal control. Further, denial by management of the right of workers to join unions was recognized as a prolific source of such disputes. And, finally, the only reasonable interpretation of the guarantees of the fifth amendment was applied, that is, that these carry no rock-ribbed insurance of any right. All rights or privileges may be taken from a person if done in a reasonable manner—with due process of law.

### The application of the act

Meanwhile, the law was being applied and a body of experience built up. If the criterion of successful operation is the minimizing of work stoppages on the railroads, then the act has been unusually successful. Let us note some of the experience with the law. Earlier in this chapter some of the weaknesses of the law of 1926, which led to the revisions of 1934, have been noted. The failure to establish an adequate system of boards of adjustment did more perhaps than any other single thing to restrict the effectiveness of the act of 1926.

Since the National Railroad Adjustment Board is closer to the routine, day-to-day controversies that arise out of collective bargaining, its activities will be noted first. Its function is "to hear and decide disputes involving employee grievances and controversies over the application and interpretations of agreements."<sup>26</sup> The breakdown of the board into four divisions, each with its specific area of authority, has been noted. This division of labor worked out relatively well, but the work has not been evenly distributed; the

<sup>26</sup> *Twelfth Annual Report of the National Mediation Board*, p. 8. Washington, D. C.: U. S. Government Printing Office, 1947.

first division of the board, with jurisdiction over disputes involving trainmen and yard-service employees, is called upon to consider roughly four times as many cases as are handled by the other three divisions combined. This has resulted in a large backlog of cases and very slow settlement after they are filed.

When negotiations fail, the referral of disputes to the appropriate division of the Board of Adjustment may be on the petition of either party or both parties. In either case, the appeal is to be accompanied by a full statement of the facts and all supporting data having a bearing on the issue. These cases then receive a hearing as soon as possible, unless a hearing is waived. However, any consideration, either with or without hearing, may require a long time, especially if by the first division. That group at the beginning of the fiscal year of 1946 had a backlog of 4720 cases. It docketed 573 more during the year while only 141 cases were decided. During the same period slightly more than 2000 cases were withdrawn. These withdrawals were in many cases not due to attainment of a mutual settlement, but rather to dissatisfaction with the slow handling of cases by the first division.

It will be recalled that the act of 1934 provided for selection of a referee to sit with a deadlocked division to decide the issue. In the fiscal year of 1946, however, the first division did not decide a single case with a referee, even though it reported forty-eight cases deadlocked at the end of the year and was especially slow in reaching agreements. On the other hand, the other three divisions all leaned heavily on the help of referees and also had not nearly so large a number or proportion of cases withdrawn. Withdrawal of cases is not to be condemned if it results in further *bona fide* negotiation between the parties toward reaching a settlement. But by the time a controversy has reached such a state, a break-off of negotiations or a strike vote may be the result rather than a jointly agreed upon settlement.

The experience of the other three divisions has been quite different; in none of them has the backlog of cases even approached the number docketed or decided during the year by the first division. Similarly, in no other division does the number of cases loom so large in comparison to the cases disposed of in other ways. And, as previously noted, all other divisions have made considerable use of referees; divisions two and four have settled more cases with a referee than without, while in division three roughly sixty-five per cent as many cases have been settled with a referee as were settled without. In fairness to the first division, it must be admitted that the tasks of the second, third, and fourth divisions are much less demanding than that of the first.

The tendencies of parties submitting a dispute to withdraw it from board consideration or to fail to submit it for ruling are of some importance. Since the parties are required by law to consider the rulings of the Board of Adjustment as final and binding, they are likely to think carefully before the submission of a case if previous disputes have not been handled to their satisfaction or if there are long delays involved. One author reports that because of the pro-labor tenor of many of the awards, about eighty per cent of the submissions are made by the unions.<sup>27</sup> Since the law reads that disputes "may" rather than "shall" be submitted to the Board of Adjustment, the parties may elect to bargain out the issue, or fight it out, without any aid from the outside. In this case, there is no limit on their action unless a national emergency is threatened and an emergency board is named. However, prior to such a time it is relatively certain that the National Mediation Board will have proffered its services in an attempt to bring about a settlement.

Perhaps the tendency to withdraw or refrain from submitting cases is responsible for the increased work load of the National Mediation Board. As has been noted, this work load is made up of three types of cases: (1) disputes involving representation; (2) disputes concerning changes in rules, working conditions, or rates of pay; and (3) the interpretation of agreements reached through mediation.<sup>28</sup>

Since the revision of the act in 1934, representation cases have been a sizable portion of all the work done by the board; the number of such cases gradually has increased, from an average of 107 disposed of per year from 1933 to 1939 and 139 per year from 1940 to 1944 to 210 in the fiscal year of 1946. However, the proportion of the total number of cases handled consisting of representation disputes gradually has decreased, from nearly one-half in 1935-1939 to slightly more than one-third in the fiscal year of 1946.<sup>29</sup>

Representation cases are disposed of in a number of ways. Perhaps three-fifths are settled by elections, some of which are handled quite differently from those held in National Labor Relations Board cases. Approximately one-third of the elections have been conducted entirely by mail in cases where employees were so scattered as to make ballot-box elections impractical. In ballot-box elections also, employees unable to vote at the place of the election were sent ballots by mail. Roughly one-fifth of the representation cases have

<sup>27</sup> Metz, H. W., *op. cit.*, p. 245.

<sup>28</sup> The third category is included owing to the fact that the Mediation Board would have been the agency that helped in the reaching of an agreement by mediation. If a question of interpretation or application arises out of a regularly negotiated agreement, it must be submitted to the appropriate division of the Board of Adjustment if outside aid is desired.

<sup>29</sup> *Twelfth Annual Report of the National Mediation Board, op. cit.*, p. 12.

been disposed of by some sort of cross-checking; the remainder were closed by dismissal, if it was found that no *bona fide* representation question existed, or by withdrawal.

The bulk of the work of the Mediation Board throughout its history has been in mediation cases. From 1935 to 1939 it disposed of an average of 112 disputes per year through mediation; from 1940 to 1944 the average per year was 206; the number climbed to 379 in the fiscal year of 1946. Cases classed as having been disposed of by mediation include those in which an agreement actually was reached by mediation and a number of other dispositions as well. For example, if mediation fails and an agreement to arbitrate is reached or the case is referred to an emergency board or if the case is withdrawn during mediation, it is classed as having been disposed of by mediation. Actually, in 1946 less than sixty per cent of the 379 cases listed as disposed of by mediation were closed by a mediation agreement.

A very small number of cases are referred to arbitration; an average of two per year were so submitted from 1935 to 1939, six per year from 1940 to 1944, and sixteen in 1946. The proportionate increase is not so marked as the numerical change; less than two per cent in 1935-1939 were arbitrated, as compared to more than four per cent in 1946, however. It will be remembered that cases go to arbitration only by agreement of both parties to the dispute. On the other hand, in every year the board has many more refusals to arbitrate than it has agreements to do so.

Interpretation of agreements has never been a time consuming task for the Mediation Board. It has only been called upon for fifteen such rulings since the amendment of the Act in 1934. In the fiscal years of 1945 and 1946 no interpretations were requested.

### Emergency boards under the Railway Labor Act

It remains now to consider the settlement of disputes through the appointment of emergency boards. Although the appointment of such boards is not an everyday occurrence, a number have been named. In the fiscal year of 1945 fifteen boards were established. However, the war period brought more such emergency action than in normal years. As a part of the emergency measures to maintain labor peace, the President issued, on May 22, 1942, Executive Order 9172 "establishing a panel for the creation of emergency boards for the adjustment of railway labor disputes." This order created a nine-man National Railway Labor Panel, "for the duration of the war and six months thereafter," from which three-man panels could be named to investigate any dispute that threatened an interruption of commerce and was not referable to the National Railroad Adjust-

ment Board. The three-man groups could be named by the chairman of the nine-man panel created by the President; the chairman could name such an investigatory panel even though a strike vote had not been taken.

On February 3, 1943, the President issued Executive Order 9299, which further affected the emergency board procedure. This order was concerned with "regulations and procedure with respect to wage and salary adjustments for employees subject to the Railway Labor Act." In essence, it provided that the chairman of the National Railway Labor Panel was to name three-man emergency boards from the panel to investigate proposed changes in wage rates and salaries if the chairman thought the proposed changes did not conform to the national stabilization policy. Reports from emergency boards established under either of the above executive orders were to be made to the President, as would have been the case if the boards were named under the normal procedures of the Railway Labor Act as amended.

Under these two executive orders, seventeen emergency boards were named by the chairman of the National Railway Labor Panel during the fiscal year of 1945. Fourteen of the boards were established under Executive Order 9172 and the remaining three under 9299.<sup>80</sup> Emergency panels in the fiscal year of 1946 rose to twenty in number. Ten such boards were named by the President under Section 10 of the act and ten were named from the National Railway Panel. The opinion of the National Mediation Board is that some of the unions that should have their disputes handled by the first division of the Adjustment Board have been by-passing that body and taking strike votes in order to create a threatening situation and thus secure the naming of an emergency panel. If this is true and the practice is being used as a substitute for *bona fide* collective bargaining, it is an undesirable development.

Title II of the Railway Labor Act was approved April 10, 1936. It applied all provisions but one of the amended Railway Labor Act to "every common carrier by air engaged in interstate or foreign commerce." The exception was the section, number (3), which es-

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<sup>80</sup> For a critical review and analysis of the functioning of the Railway Labor Act during the war see: Northrup, H. R., "The Railway Labor Act and Railway Labor Disputes in Wartime," *American Economic Review*, June, 1946, Vol. XXXVI, No. 3, p. 324. The tone of the article is critical of presidential intervention, which Mr. Northrup apparently considered heavily biased in favor of unions. While existence of the intervention cited is not to be denied, the fact is that railway labor disputes would have been especially damaging to the war economy. Under such circumstances, emergency action is more understandable on railroad than in many other industries. The critical attitude throughout the article is in sharp contrast with the evaluation by Kaltenborn, H. S., *op. cit.*, p. 72. Metz, H. W., *op. cit.*, p. 243, also gives a favorable evaluation.

tablished the National Railroad Adjustment Board. Since this body had no jurisdiction over disputes between air carriers and their workers, Title II made it "the duty of every carrier and of its employees, acting through their representatives, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment." Such boards were to be established by agreement of the two parties. The National Mediation Board was empowered to direct the establishment of a National Air Transport Adjustment Board of four members when it was deemed necessary to have a permanent board. After the establishment of the national board, system, group, or regional boards could be disbanded if the parties agreed to come under the jurisdiction of the national board. Up to January, 1948, the National Mediation Board had not directed the formation of the National Air Transport Adjustment Board. However, some mediation cases were being heard that concerned the air carriers and their employees. In the fiscal year of 1945 eleven mediation cases concerning the airlines were disposed of.<sup>31</sup> In the fiscal year of 1946 there were thirty-three mediation cases handled and twenty-four representation disputes, showing a rapid increase in the utilization of the services of the board in air transportation disputes.<sup>32</sup>

Despite all the criticisms of the act, it has functioned well. The machinery established under it has made transportation stoppages infrequent; there is an occasional work stoppage in transportation, but a general tie-up is extremely rare. The two-day nation-wide strike on the railroads in May, 1946, was the first of such magnitude in a half-century. It has been labeled "the most disruptive tie-up in the history of American Railroads."<sup>33</sup> Altogether, the time lost and the disruption of transportation growing out of labor disputes is, relative to the amount of work and the service rendered, negligible.

Are the principles and philosophy of the act applicable to other types of industry? Probably they are, although the machinery used to apply the principles may not be. Essentially, the act puts heavy emphasis on the use of collective bargaining in the industry and offers various aids to negotiators to enable an agreement to be reached without a final test of bargaining strength. Without any question this philosophy of reliance on collective bargaining is applicable to all sorts of industries. Mutually determined wages, hours, and working conditions specifically set down so that each

<sup>31</sup> *Eleventh Annual Report of the National Mediation Board*, p. 30. Washington, D. C.: U. S. Government Printing Office, 1946.

<sup>32</sup> *Twelfth Annual Report of the National Mediation Board*, *op. cit.*, p. 33.

<sup>33</sup> *Ibid.*, p. 1.

party knows that its representatives have had a part in determining the rules and knows what its rights and duties are mean better day-to-day relationships. It may be argued that the unions on the railroads are more stable and easier to bargain with than in many other industries. Although there may be truth in this statement, the fact that there has been federal sanction since the first World War—although rather nominal from 1920 to 1926—of *bona fide* unions and collective bargaining has had its influence on the type of unionism now present. In most cases the unions do not have to fight for their existence and can devote their time to representing their members and acting as bargaining agents.

Another principle underlying the act is equally applicable in other industries. Government action puts heavy emphasis on mediation and has kept arbitration on the basis of completely voluntary submission. Apart from assuring that both parties are allowed to organize for *bona fide* collective bargaining, the principal function of federal, state, or local governments in the field of labor disputes should be to aid in any way possible in mediation or voluntary arbitration of disputes. The nation cannot afford to embark on a program of compulsion in dispute settlement, except possibly for a very restricted list of occupations in which the element of public interest is especially high, as in the case of firemen, police, nurses, or possibly employees of gas, water, and electric companies.<sup>34</sup> Since the jobs of most workers are not so tied to public interest, there is room for only a very narrow application of the idea if any at all.

The virtue of establishment of special emergency boards and compulsory "cooling-off" periods before a strike can be opened is subject to much question. Forcing parties who have found no basis of agreement to wait, perhaps sixty days, before testing each other's strength may do little to bring an attitude conducive to peaceful negotiation. In fact, a "cooling-off" period may well become a "heating-up" period. With the enactment of the Taft-Hartley Law, the nation probably will have opportunity to observe the validity of the thought that such delays will aid in maintaining labor peace.

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<sup>34</sup> Any proposition that certain groups in our society be required to settle any dispute without the right to strike as a last resort is one that should be carefully hedged about with safeguards. Certainly society does not have a right to impose such restrictions unless it is willing to accompany them by special measures to ensure that demands and grievances will be studied and acted upon even without the stimuli of threats of work stoppage. Such special measures should include machinery for reviewing wage rates at certain intervals and maintaining a stated relationship to rates in other occupations or to the cost of living or perhaps some other factor. These should also demand special protection of job rights, methods of grievance settlement, and other protections in place of freedom to fight for certain issues or demands.

The prohibition of closed shop contracts within the jurisdiction of the act is of interest; since the enactment of the Taft-Hartley Law a similar provision has been generally applicable, but for years the provisions of the Railway Labor Act and the National Labor Relations Act were sharply divergent on the closed shop. Although it is not desirable to have persons in a work place who benefit from the wages, job security provisions, and other conditions for which the union has negotiated without being union members and helping support the organization, the closed shop is not necessary to eliminate such "free riders." The absence of the closed shop on the railroads does not seem to have presented a serious problem to the unions. A union shop agreement that is not hedged about seems to offer adequate opportunity for union security. The philosophy toward the closed shop shown in the Railway Labor Act was a reasonable one.

### Questions

1. Are there provisions in railway labor legislation that have not yet been applied to workers in fields other than transportation? If so, what are the provisions? Why?
2. Is compulsory arbitration of all railway labor disputes that cannot be settled by direct negotiation a defensible means of solution?
3. What are the relative advantages and disadvantages of mediation and arbitration as means of settling knotty labor disputes?
4. To what extent was the Railway Labor Act of 1926 as amended the forerunner of labor laws applicable to non-railroad workers?
5. Compare or contrast the Supreme Court decisions that upheld the Railway Labor Act with those which dealt with the validity of the National Labor Relations Act.
6. Evaluate the functioning of special legislative enactments applicable especially to workers employed on the railroads. What is your opinion of the wisdom of special laws for these workers?





## PART III

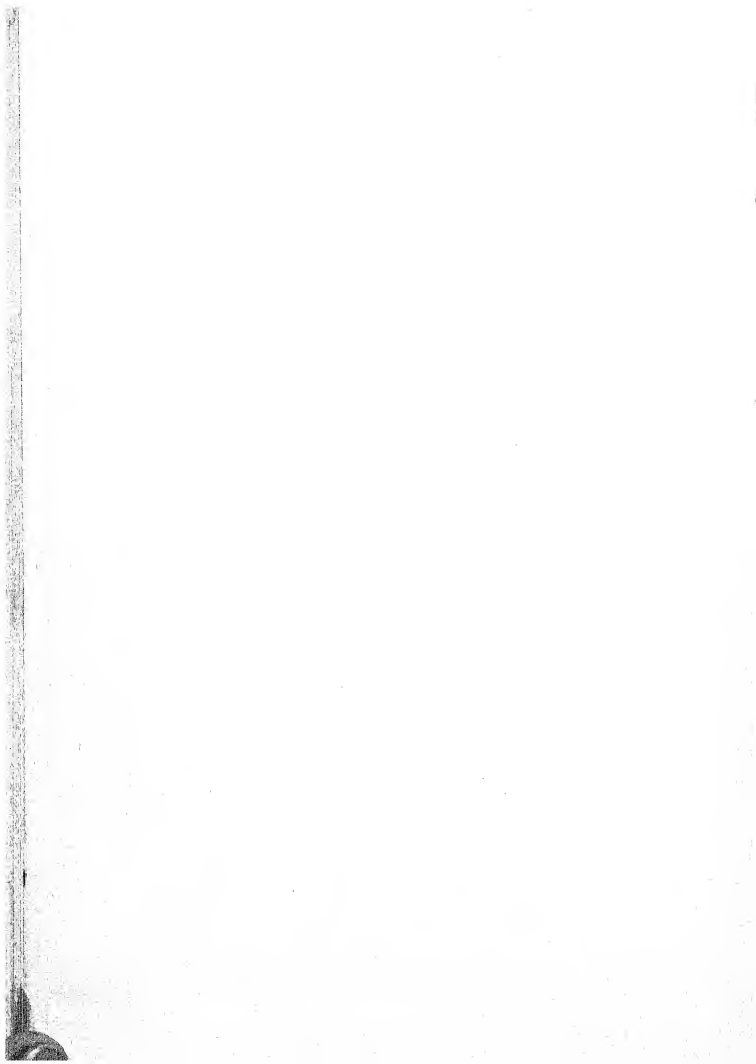
### INTRODUCTION

The chapters of Part III close the study with a survey of the effects of World War II and the postwar period on labor controls. These effects are noted only when the war or postwar period brought clear shifts in philosophy or in regulation. In matters such as child labor regulation or minimum wages, where there was no significant change in philosophy and the tightness of the labor market made minima less necessary, there is little need of discussion.

The war brought especially severe maladjustments in labor relations, wages, labor supply, and so forth, so the first task will be to note briefly these maladjustments and indicate alternative curative approaches thereto. Following that, the method actually adopted will be discussed, as will the manner in which it has functioned.

Probably management-labor relations were more tense and uncertain in the first two years after the war than they ever have been in our modern history. To the student of labor problems and labor relations this was an understandable situation; conditions were almost perfect for such an outbreak. However, to many legislators and much of the public this turmoil represented a threat to the American way of life, and steps were taken to bring about better labor relations by means of legislative enactment. Our story will not be complete, therefore, without a review of postwar labor trouble and of the provisions of the Taft-Hartley Law. Because of the newness of the law little can be said about court attitudes toward it or the functioning of the act.

A final task in any study such as this is a brief summary of the information presented in foregoing pages and the derivation of conclusions that seem warranted by the facts. This is done in the final chapter.



## CHAPTER XXI

### THE ELIMINATION OR SETTLEMENT OF LABOR DISPUTES

#### Wartime stresses in labor relations

The type of problems that arise in a war economy has been commented on at various points in other chapters. The difficulties that arose in World War II were not unique; however, the problems were more acute and the resulting action more sweeping. With the experience of the first World War as guide and the goad of a struggle for national existence, federal action, hurriedly undertaken, was surprisingly good. The economic controls of the war years were not perfect, but considering the emergency and pressures under which they evolved, they made sense and functioned relatively well.

Probably the most publicized labor problem of a war period is that of labor unrest; certainly in World War II that was the case. Although it can be and has been argued that any work stoppage during a war is unwarranted, there is probably no chance, even in wartime, of a democratic society completely escaping such stoppages. Even with a pledge by labor and industrial leaders shortly after the beginning of the war that they would not engage in strikes or lockouts, some did occur. This was admittedly undesirable, but the percentage of available work time so lost did not amount to more than one-tenth of one per cent, a figure sharply lower than that of prewar years.<sup>1</sup> It must be recognized that there was not so much of a problem of work stoppages as has often been implied. Probably the reason for this was in good part the policies and actions of the federal government, which were a combination of those developed before the war and others instituted during the emergency. Some of those policies and practices already formed have been discussed earlier in this study and need be reviewed only briefly here.

One of the latter is the activity under the National Labor Relations Act, which many have criticized as the cause of many more disputes than otherwise would have occurred. The issue cannot be decided definitely, but the opposite probably is true; the thought has been advanced in this study that collective bargaining between

<sup>1</sup> *Monthly Labor Review*, May, 1946, Vol. 62, No. 5, p. 720.

unions and employers, once the union has been accepted and no longer has to fight for its existence, is the best way of determining labor conditions conducive to labor peace. By the outbreak of the war, owing at least in part to the policies of the N.L.R.B., unionism was well established in many mass-production industries and collective agreements were in effect. These and the policies laid down by union leaders were such as to minimize the number of disputes.

There is a second reason why the N.L.R.B. may be credited with lessening the number of disputes between management and labor. Representatives of the board are not expected to act as mediators in the settlement of disputes; it is clear, however, from the great number of cases withdrawn or otherwise settled without formal action by the board that informally the suggestions or other actions of representatives of the board result in averting many disputes that might otherwise develop into work stoppages.<sup>2</sup>

A second organization of some age should be noted for its actions in keeping down the number of and in settling labor disputes. The Railway Labor Act as amended gave to railroad, Pullman, express, and airline workers the right to organize and bargain collectively. It will be remembered that the Railway Labor Act, in addition to narrowing the basis of misunderstandings likely to arise in greater number without jointly determined agreements, made provision for mediation and other government activities to settle disputes. The manner in which the law was applied may have allowed issues to go to the emergency board stage prior to settlement, but actual stoppages of transportation, even in local areas, were extremely rare.

#### The federal Conciliation Service during the war

Another non-emergency agency of the federal government that did much work in averting or settling disputes during the war while receiving a minimum of publicity is the United States Conciliation Service.<sup>3</sup> The formation and early functioning of the service during the first World War has already been noted. Its record since 1935, however, is a much more impressive one. The classification of cases handled has changed from time to time so that comparative figures are not entirely adequate, but the record shows that much work has been done. For the first time since 1919 the service was active in 1934 in more than a thousand cases; in no year since has the number gone below one thousand. Beginning in 1937 the number of cases began to rise rapidly. During the last complete fiscal year before the outbreak of war, the service was involved in over 3700 disputes.

<sup>2</sup> See Chs. XVI and XVII.

<sup>3</sup> Changed in the Taft-Hartley Law to the National Board of Mediation and Conciliation. See below, Ch. XXV.

This figure skyrocketed after the war broke out when more and more government effort was directed toward trying to avert work stoppages. In the fiscal year of 1944 the service was active in over 21,500 disputes. Of these it was able to settle more than 16,500, while the remainder were referred to other agencies for settlement. In addition, it was involved in over 3000 "other situations," arbitrations, technical advice, consultations, and the like.<sup>4</sup> If one takes into consideration all such sorts of controversies, the service was involved in approximately 75,000 matters from the outbreak to the close of hostilities.

The work of the Conciliation Service is in keeping with the general philosophy of the federal government that its function is not to settle disputes arbitrarily, but rather to aid the disputants in finding a common ground of agreement on which they can settle. All during the war, when freedom to strike and to lock out was curtailed, the commissioners of conciliation—about 300 of them at the height of the war—were putting emphasis on free negotiations and collective bargaining.<sup>5</sup>

The impact of war necessitated some changes, in addition to the increase in the staff, in order to meet the demands placed on the service. One of the changes was to decentralize. Five regional headquarters were set up in New York, Atlanta, Cleveland, Chicago, and San Francisco. This was an attempt to speed up attention to cases that developed. From this breakdown the work was directed on a regional basis; any representative of labor, management, or the public could ask for aid that was available if the parties were willing to utilize it. However, the conciliators had no power to force themselves into any dispute or to force any action. Another development of the war period was the growth of a small staff of specialists in different industries whose technical knowledge made them especially valuable in disputes in the particular industry with which each was familiar. Prior to the war when the mediation efforts of the commissioners failed, the government withdrew from the case. This was changed in two ways; during the war a dispute in which no agreement was reached was referred to the War Labor Board. At the close of the war there were a number of cases in which special fact-finding commissions were set up.

The war also brought a great increase in the amount of arbitration work done. In the fiscal year of 1944, for example, the service was involved in 1185 arbitrations. This work was done primarily by a staff specially trained for arbitration work, although regular

<sup>4</sup> *Thirty-Second Annual Report of the Secretary of Labor* (fiscal year ended June 30, 1944), p. 9. Washington, D. C.: U. S. Government Printing Office, 1945.

<sup>5</sup> For a brief history of and commentary on the service see: "U. S. Conciliation Service, 1913-1947." *Monthly Labor Review*, August, 1947, Vol. 65, No. 2, p. 172.

conciliators occasionally were assigned to arbitration. The latter was done reluctantly, however, owing to recognition of the fact that a conciliator may lose his reputation for impartiality if he arbitrates a few cases in which he is forced to take sides and make a ruling. However, since submission of a case to the War Labor Board meant, in essence, compulsory arbitration, and that with a long wait involved, many persons preferred the action of the Conciliation Service and its arbitrators.

In view of the postwar legislative changes in the Conciliation Service, it is somewhat superfluous to evaluate its functioning in any detail. Much criticism has been leveled at the fact that the service was a part of the Department of Labor; many presumed it therefore to be partial toward labor. It has been argued that there would be much wider acceptance of the conciliators if there were no connection with the Labor Department. The record of taking part in about 75,000 cases during the war and settling over three-fourths of them by mediation and voluntary arbitration speaks for itself. Although the postwar revisions of the service may be an improvement, the preceding organization had an impressive record.

#### The National Defense Mediation Board

Although the federal government put all possible emphasis on the use of voluntary methods in the settlement of disputes, the demands of the war period were such that a plan had to be developed to handle those cases in which such methods failed. This fact was recognized by President Roosevelt well before the outbreak of the war. By early 1941 the rearmament program was swinging into high gear. Rises in costs of living and a greater amount of employment put many worker groups in a frame of mind to demand, and if necessary to strike for, higher wages. From December, 1940, to March, 1941, the number of strikes more than doubled and the man-days lost due to work stoppages more than tripled.<sup>6</sup> Defense production and transportation were severely impeded by these strikes, some of which were violent. It was felt that existing machinery for the settlement of disputes was not proving adequate for the task at hand. In the customary manner, a new agency was set up rather than an attempt being made to improve upon the existing ones. This was the National Defense Mediation Board, established by executive order on March 19, 1941.<sup>7</sup>

<sup>6</sup> Jaffe, L. L., and Rice, W. G., "Report of the Work of the National Defense Mediation Board" (mimeographed report). Later published under the same title as Bureau of Labor Statistics, Bulletin No. 714. Washington, D. C.: U. S. Government Printing Office, 1942. Citations herein are to the pre-publication mimeographed copy of the study.

<sup>7</sup> Executive Order 8716.

President Roosevelt, in creating the National Defense Mediation Board, declared it to be "essential in the present emergency that employees and employers engaged in production or transportation of materials necessary to national defense shall exert every possible effort to assure that all work necessary for national defense shall proceed without interruption and with all possible speed." For that reason the board was created; it was composed of eleven members, three representing the public and four each for management and labor. A board so constituted was a novel experiment in this country; no federal agency for dispute settlement had made extensive use of the idea of a tripartite board before. It was a wise approach to the problem of dispute settlement, for the solutions coming from such a board are more likely to be acceptable to the disputants than are those handed down by an "impartial" person or board.

The board was authorized to act only when the Secretary of Labor certified that a management-labor controversy had arisen "which threatens to burden or obstruct the production or transportation of equipment or materials essential to national defense . . . which cannot be adjusted by the commissioners of conciliation of the Department of Labor." The authorization excluded any dispute coming within the authority of the Railway Labor Act.

Once the certification of a dispute was made by the Secretary of Labor, the board was authorized by the President to take any of the following actions: (1) to assist the parties to a dispute to settle by themselves, in other words to mediate; (2) to afford means of voluntary arbitration when the parties agreed to abide by the ruling of the arbitrators, or to name arbitrators when requested to do so; (3) to assist the parties in the establishment of methods of settling future disputes; (4) to investigate issues between employers and employees, conduct hearings, take testimony, make findings of fact and recommendations when "the interests of industrial peace so require"; and (5) to request the National Labor Relations Board to expedite its actions in disputes that involved a question of the appropriate bargaining unit.

Whenever a dispute was brought to the attention of the board without certification from the Secretary of Labor the board was required to refer the matter to the Department of Labor. If a dispute was certified in the prescribed manner, a panel or division of the board of not less than three persons, representing the three groups, was named to hear the case. The full board could hear a dispute, but it was not common practice to do so.

The Executive Order closed with an exhortation to employers and employees that showed clearly the weakness of the whole organization as far as power to enforce any action was concerned:



"It is hereby declared to be the duty of employees and employers engaged in production or transportation of materials essential to national defense to exert every possible effort to settle all their disputes without any interruptions in production or transportation. In the interest of national defense the parties should give to the Conciliation Service of the Department of Labor and to the Office of Production Management (a) notice in writing of any desired change in existing agreements, wages, or working conditions; (b) full information as to all developments in labor disputes; and (c) such sufficient advance notice of any threatened interruption to continuous production as will permit exploration of all avenues of possible settlement of such controversies so as to avoid strikes, stoppages, or lockouts."

This conclusion was indeed a confession of great weakness. A certain policy was declared and employers and employees were urged to follow certain practices. But if they did not choose to abide there was nothing to be done about it; at that time, with war for us not yet a reality, public sentiment and the attitudes of employers and employees were not cohesive enough to be marshaled as an effective means of executive pressure to secure observance of national policies. As will be seen, this lack of power of enforcement was to kill the board at the time when it was most needed. No change in the power of the board was made at any time; in fact, the only change of any sort was to provide for the appointment of alternates for the regular members of the board.<sup>8</sup>

Even without direct power of enforcement the board was able to do good work and aid in the settlement of many disputes that would have disrupted defense production. In judging the work of the board, it is well to keep in mind that it began action in a case only after the Conciliation Service had tried to settle the dispute and failed. Even though the mediation efforts of the Conciliation Service had failed, the board tried first to mediate the cases coming before it. While authority to make findings of fact was available when mediation failed, it was reported that about seventy-five per cent of all wage and union-security cases were settled by agreement and without resort to making public recommendations.<sup>9</sup> Of all cases on any issue handled in the first six months of board action, only about one-third required recommendations.

In handling a case brought before it, the board asked the disputants to send to a hearing representatives who had sufficient authority to negotiate for the groups they represented. At the hearing there was nothing of the air of a court or trial; the chairman of the panel allowed each party to present its position. No oaths were adminis-

<sup>8</sup> Executive Order 8731, dated April 4, 1941.

<sup>9</sup> Jaffe, L. L., and Rice, W. G., *op. cit.*, Part II, p. 2.

tered and no particular attempt was made to establish the validity of facts. If it became clear that the meetings were not progressing, it was customary for the joint conference to break up into meetings of employer and employee or union representatives. At this point the tripartite panel was of particular value; the panel member representing the union point of view, for example, could meet with the union group and get from its members a clearer picture of the exact ways in which they might be willing to compromise. Such split meetings were not always necessary. On the other hand, when they occurred the good offices of the partisan representatives were not always sufficient to get concessions. However, as was pointed out above, efforts at mediation succeeded in a surprising number of instances in view of the fact that the only cases certified to the board had already been the subject of an attempt at mediation by the Conciliation Service.

Of course, the realization by both parties that failure to agree would bring fact finding and public recommendations followed by pressure to accept the proposals probably had an influence on the success of the efforts at mediation.<sup>10</sup> Where public recommendations had to be made, much more factual information had to be gathered than in mediation. As a result, the board frequently employed special representatives or investigators to dig out pertinent data and present them along with suggested solutions. In one or two cases the board itself did the investigating.

Short of public recommendations, the board at some times went beyond straight mediation when it was felt that the facts involved were clear. In the later stages of hearings it sometimes let it be known to the parties that if public recommendation became necessary it would recommend a certain settlement or would not recommend another one. Such a statement, while having no official status, was enough to give one party or the other an edge in bargaining on the particular point involved in the board's statements of intended finding.

The board was criticized for failing to adopt and follow any set body of principles to guide it in making consistent decisions in similar cases.<sup>11</sup> In respect to some issues, at least, it was the avowed purpose of the board not to adopt any such principles but rather to work out the best solution for each case that arose. Jaffe and Rice argue that the board did follow a consistent policy in questions other

<sup>10</sup> The fact that in the North American Aviation, Federal Shipbuilding and Drydock, and Air Associates cases the President ordered government seizure and operation when the plants refused board recommendations probably also had an influence on securing acceptance. (All plants were returned to private operation by January 7, 1942.)

<sup>11</sup> Kaltenborn, H. S., *op. cit.*, p. 109.

than that of union security.<sup>12</sup> They point out that it was a standard assumption of the board that workers should be guaranteed the right to organize and bargain collectively. This argument is not impressive, however, in view of the fact that this right had been written into federal law and sanctioned by the courts long before the board came into being, so that it had no choice but to recognize it.<sup>13</sup> It is further argued that the board consistently accepted the actions of the N.L.R.A. and insisted that no collective agreement be reopened during its lifetime without mutual consent. As for wages, it was argued that local wage scales and standards and cost of living were considered in determining minima.

The arguments in defense of the consistency of the board are not convincing. It would be more convincing to say that the board did waver about considerably—but understandably. It started with no advantage of a precedent body whose mistakes it could observe and avoid; it was given only the difficult cases that had defied earlier attempts at mediation. It had no general powers of enforcement other than the possibility of seizure in emergency, so it had to try for settlements that would be accepted. In addition, its lifetime was relatively short, ending before the pressures of war became severe. Without question, if the board had functioned during the war years it would have been forced to adopt certain basic principles in order to lighten its load. The board received only 109 cases from its formation to December 7, 1941, a relatively light burden. In view of these facts, the inconsistency of the board may be criticized, but it was understandable.

The board was dealt a heavy blow by Mr. John L. Lewis of the United Mine Workers Union and the C.I.O. It came as a result of the captive coal mine case in the fall of 1941.<sup>14</sup> The case arose out of the attempt of Lewis to get a union shop contract covering the men in the captive mines, that is, the mines owned by the steel companies to supply themselves with coal. Negotiations on the point failing, 40,000 miners in the captive pits went on strike on September 15, 1941; this stoppage would have affected the steel output, all-important to the defense effort, before many weeks had passed. The board a few days later prevailed upon the union and operators to agree to a return to work for thirty days while negotiations continued, and thereafter to give a three-day notice of intent to stop pro-

<sup>12</sup> Jaffe, L. L., and Rice, W. G., *op. cit.*, Part II, pp. 8-11.

<sup>13</sup> The National Labor Relations Act applied only to business that affected interstate commerce, but probably without exception all defense plants from which cases might have been certified to the board would affect commerce and their workers therefore would have a legal right to organize.

<sup>14</sup> Jaffe, L. L., and Rice, W. G., *op. cit.*, *passim*. See also, Kaltenborn, H. S., *op. cit.*, pp. 99-103.

duction. Hearings before a panel continued during the truce, but to no avail; late in October the union gave a strike notice.

The panel urged that the strike be called off again and that the parties accept one of two proposals as a final means of settlement, both of the plans amounting to arbitration of the dispute with compulsory acceptance of the award. This Mr. Lewis refused to do; in the next few days he refused to accede to three letters from the President requesting that he agree to settle along the lines of one of the board proposals, and the strike went into effect. A few days later, after a White House conference, Mr. Lewis agreed to call off the strike again and allow the full board to consider the case and make its final recommendation on November 10.

The board recommendations rejected the demand of the union for a union shop; the vote was nine to two, with employer, public, and the A. F. of L. representatives comprising the majority. The two C.I.O. representatives voted against the report and showed their disapproval by resigning from the board on the following day. Within the next two or three days all alternate members representing the C.I.O. resigned, leaving the crippled board without C.I.O. men until it was abolished two months later.<sup>15</sup> No further cases involving the C.I.O. were certified to the board, and it lost much of the prestige it had previously enjoyed. A few weeks after the resignations came Pearl Harbor, which gave an opportunity to reorganize the dispute-settling agency as a war measure. This was done promptly.

#### The National War Labor Board: organization

In view of the limited effectiveness of the N.D.M.B. and of the emergency created by the outbreak of war, President Roosevelt on December 17 called a labor and industry conference to discuss labor policies for the duration of the war. The conference was attended by twelve union officials equally divided between the A. F. of L. and the C.I.O. and twelve industrial leaders, with co-chairmen from outside their ranks. A number of points were readily agreed upon, but the representatives could reach no common ground as to whether the proposed dispute-settling board should be allowed to consider and rule on issues of the closed and union shop. When on December 23 the co-chairmen, William H. Davis and Senator Elbert Thomas, reported to the President, it was thought that the conference had been unsuccessful owing to inability to agree on this point.

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<sup>15</sup> As a matter of interest, the union did get the union shop. The President finally achieved agreement to arbitration by a three-man panel composed of Mr. Lewis, Benjamin Fairless of the U. S. Steel Corporation, and J. R. Steelman, Director of the Conciliation Service. By a two-to-one ruling this body granted the union's demand.

However, the President acted as if no such dispute had plagued the conference.

President Roosevelt announced acceptance of the points on which he said the conferees had agreed. These were: (1) for the duration of the war there shall be no strikes or lockouts, (2) all labor disputes were to be settled by peaceful means, and (3) a National War Labor Board was to be established for the peaceful settlement of disputes that did arise.<sup>16</sup> Reportedly the industrial representatives were surprised by the President's announcement, for in their mind acceptance of these points was contingent on another which excluded the closed shop from the board's authority.<sup>17</sup> However, they accepted the presidential pronouncement and the unions did likewise.<sup>18</sup> The way was paved for the establishment of the National War Labor Board, the second such body to bear that name; a similarly named body functioned during World War I.

The President acted promptly, and on January 12, 1942, he issued Executive Order 9017 creating the new board. As reasons for formation of it the President cited the declaration of war, which "demands that there shall be no interruption of any work which contributes to the effective prosecution of the war," and the points of agreement reached at the labor-management conference. The board was made up of twelve "special commissioners," equally divided among labor, management, and public representatives. Provision was made for alternate members for employer and employee representatives. The board did not have jurisdiction in disputes for which methods of adjustment had been set up (such as railway disputes) until those methods had been exhausted.

A set procedure for the settlement of disputes was specified; the steps were: (1) direct negotiations between the parties involved, (2) failing settlement in this manner, the conciliators of the Department of Labor were to be called in if they had not previously entered the case, and (3) failing successful conciliation, the case was to be certified to the new board. However, the board's hands were not tied in the event a case was not certified to it; on its own discretion and after consultation with the Secretary of Labor, it could take jurisdiction over a case.

This power of the board to act of its own volition was significantly different from that of its predecessor. In terms of the executive

<sup>16</sup> Reproduced in Executive Order 9017, dated January 12, 1942.

<sup>17</sup> Kaltenborn, H. S., *op. cit.*, p. 113.

<sup>18</sup> The employer representatives called attention to the dispute in their letter of acceptance. They recommended that the new board not accept questions of the closed shop. They argued that to do otherwise would intensify management-labor disputes and increase their number. They argued, to no avail, that the President should exclude this subject from the authority of the board.

order, "after it takes jurisdiction, the Board shall finally determine the dispute, and for this purpose may use mediation, voluntary arbitration, or arbitration under rules established by the Board." No longer was the board an agency that could only mediate; it could arbitrate under its own rules. What this amounted to was the creation of an agency empowered to conduct compulsory arbitration for the duration of the war.

Once the new board was established, the old National Defense Mediation Board ceased to exist. Its personnel, records, equipment, and so forth were transferred to the War Labor Board. The new body was destined to become one of the most important of the war agencies. It evolved into the key agency for the settlement of labor-management disputes and also for the stabilization of wages. Let us first note the actions of the board in settling disputes.

#### The National War Labor Board: functioning

The board began its functioning as the final court of appeal for all labor disputes not settled earlier, even railway labor cases. However, on May 22, 1942, the President, by Executive Order 9172, created the National Railway Labor Panel; all railway disputes not otherwise adjusted were to go before three-man boards named from that panel. Such a board was to "have exclusive and final jurisdiction of the dispute and shall make every reasonable effort to settle such dispute." Thus the N.W.L.B. lost a little of its jurisdiction at an early date, but it still held more than it could properly care for.

By the end of November, 1942, 918 dispute cases had been referred to the board, along with over 800 wage agreements submitted for approval<sup>19</sup> and almost 400 arbitration agreements.<sup>20</sup> However, in that time it closed only 330 cases, leaving a backlog of almost 600 dispute cases alone. Even within the first year of its life objection began to be raised concerning the slow handling of business, a chorus that was to become louder as the backlog of cases grew. The slowness with which decisions were rendered was due in part to the inheritance of the more difficult cases which the National Defense Mediation Board had been unable to settle. In addition, the National Board in Washington was trying to handle too many cases directly. This might have been desirable, since precedents and policies were being formulated, but it could not long be continued. Another reason for the slow action was that the members of the board split in their opinions on more than one-fourth of the cases considered in the first year.

<sup>19</sup> See below, Ch. XXII.

<sup>20</sup> Kaltenborn, H. S., *op. cit.*, pp. 122-123.

The board saw fit to limit its jurisdiction in another field; in December, 1942, it stated <sup>21</sup> that it did not have authority to issue any directive or order in a dispute between state and municipal employees and their employing government. Such a limitation probably did not greatly reduce the number of cases brought before the board.

In most instances the board used a broad interpretation as to its appropriate jurisdiction, however. Perhaps the best example of this statement is the action of the board in taking up the dispute between Montgomery Ward Company and its employees in the Chicago plant and, at a later date, those elsewhere. In such a case, it took a rather liberal interpretation to see a reasonably close relationship between the dispute over unionization and the effectiveness of the war effort. In addition, the board interpreted its powers as warranting the handling of cases that arose between employers and their foremen. Clearly, if the foremen worked in war plants, the dispute could affect war production; the key question herein involved was whether foremen were to be considered as employees within the meaning of the executive order and the War Labor Disputes Act.

In view of the slow functioning of the board and the exclusive centralization of work in Washington, a major reorganization was effected in January, 1943. At that time the original field organization of ten regions, each with its tripartite regional advisory council, was abandoned. In its stead, a twelve-region organization with Regional War Labor Boards instead of advisory councils was set up. The national board delegated authority over labor-dispute and wage-and salary-adjustment cases to the regional boards. The Washington body kept original jurisdiction in disputes that were national in character; in addition, the national board acted as a supreme court to which decisions of the regional boards could be appealed within ten days. Appeal was not an automatic right; the board granted the right to appeal if (1) a significant, novel question was involved, (2) procedure was unfair to the petitioner, or (3) the decision exceeded board jurisdiction or conflicted with established policy. The board could also review a case on its own motion.

At the same time the board officially dropped the mediation function. Thereafter the representatives of the board were concerned with making findings of fact and recommendations. However, there is no question that the persons involved missed no chance of settling an issue. Whether or not the mediation function could be officially performed, it did not cease to exist in January, 1943.

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<sup>21</sup> Press Release B-351, December 15, 1942.

### The War Labor Disputes Act

Up to June, 1943, the activity of the War Labor Board was based only on an executive order of the President creating the board and outlining the functions to be performed. In any case of refusal to accept board rulings, the only avenues of enforcement were an attempt to utilize publicity and governmental pressures and seizure of a plant by executive fiat. The latter had been used in only a few instances, and it was not a satisfactory basis for action. In June, 1943, Congress acted to give legal statement of a federal policy on labor disputes in war industries.<sup>22</sup> In many ways the law merely stated the policies and practices already in effect, but in others it went much farther.

The act conferred upon the board certain powers that it was to exercise. One was to act in labor disputes certified to it by the Conciliation Service or undertaken on its own motion. A second was to decide such disputes "and provide by order the wages and hours and all other terms and conditions . . . governing the relations between the parties." A third power was to require the attendance of persons at meetings, to issue subpoenas, and to go into federal district court for an order to obey such subpoenas. There were other minor provisions, but these three were the important ones applying to the War Labor Board. Essentially, the act restated the powers being exercised by the board and added the authority to subpoena.

There were, however, other sections to the act. The President was given power to direct the seizure and operation of any plant, mine, or facility engaged in war production in which there was a disruption of production such that the war effort would be "unduly impeded." Seizure could be by any department or agency of the government that the President chose. Upon seizure, the terms of employment were to remain those in effect at the time the government took possession. After taking possession, a request could be made to the War Labor Board for permission to make changes in terms of employment. Any person wilfully interfering with government operation of an occupied plant could be subject to a fine of \$5000 or imprisonment for one year or both.

The act also stipulated a required "cooling-off" period for war contractors and their employees. When a dispute threatened in a war contractor's firm, a representative of the employees was required to give notice to the Secretary of Labor, the National War Labor Board, and the National Labor Relations Board; such notice was to

<sup>22</sup> War Labor Disputes Act, Public Law 89, Ch. 144, 78th Congress, 1st Session, June 25, 1943.



state the issues involved in the dispute. After the notice was given, the employer and his workers were required to continue production under the existing circumstances for at least thirty days. In the interim the National Labor Relations Board was to prepare a "strike ballot" stating the issues involved and providing for a vote on whether or not employees wished to strike. After the period of notice had expired and if the employees were certified by the N.L.R.B. as having voted in favor of the strike, it could be called. The above was not applicable to workers in a plant or facility of which the government had taken possession.

This provision probably did not bring about the labor peace that was desired. Since a thirty-day notice and strike vote were necessary before a legal strike could be called, many notices were filed long before all possible avenues of settlement had been explored. Thus, in many instances, collective bargaining was being carried on with a strike notice in the background; such an atmosphere was not conducive to effective collective bargaining. It was, in part, a recognition of this fact that caused the President to veto the act when it was submitted to him. His action was ineffective, however; the law was passed over his veto.

A final provision of the act should be mentioned, although it was not of importance as a means of maintaining labor peace in wartime. This was a prohibition against any political contribution by "any national bank . . . corporation . . . or . . . labor organization." This prohibition was limited to elections of federal officials. Exactly why it was included in a war labor disputes act is not clear; there was no close and reasonable relationship between the prohibition and the evil the act sought to remedy.

The act was to be effective until six months after the duration of hostilities. It officially died on June 31, 1947, as a result of a presidential proclamation officially ending hostilities December 30, 1946.

Under the War Labor Disputes Act and the National War Labor Board a number of labor policies were laid down that are worth noting. Probably the most important of these was that concerned with the question of union security. It will be remembered that the representatives of industry who participated in the December, 1941, conference opposed strenuously any consideration by the proposed board of questions of union security. The board did accept such issues and found them, in the early stages at least, to be some of their most difficult. However, the National Defense Mediation Board had left behind a few cases on such issues that offered a means of solution which was utilized and improved upon by the new board.

Although the N.D.M.B. left decisions in its record in which maintenance of membership had been awarded, it was not a new idea

with them. Studies by the Bureau of Labor Statistics indicate that such agreements were made as early as 1925. Actually, such agreements were logical developments, since most unions want as much security of membership as possible and many employers want as little as possible; a maintenance-of-membership clause, which provides essentially that all persons who are union members must retain membership as a condition of employment, is a compromise between the viewpoints of both.

The National Defense Mediation Board first ran into the problem of union security in the Snoqualmie Falls lumber strike. The dispute was in a white-hot stage when the Mediation Board undertook settlement. With both parties so adamant in their stand, a delicately balanced compromise was about the only possible means of settlement. Maintenance of membership proved to be the compromise that the union would accept. There were other such instances, the cases of Cheney Silk and Federal Shipbuilding and Drydock being but two. It will be remembered that the board was killed by its inability to settle the union security issue in the captive mines case.

The new board encountered the issue in hundreds of cases; one of the earlier ones involved a textile plant of Marshall Field and Company and a joint board of the Textile Workers Union of America, C.I.O. The settlement reached was that the company recognized the union as the exclusive bargaining agent of the employees and granted the maintenance-of-membership clause. This was tempered somewhat by a provision stating that maintenance of membership in good standing was contingent on signed voluntary authorizations for the checkoff of union dues.

Other cases involving union security came one after another. By June 18, 1942, the board had experimented enough to devise a type of agreement to which employer members would be willing to consent. In the case involving the Ryan Aeronautical Company and the United Automobile Workers, C.I.O., the maintenance-of-membership clause reached something near its final form. Thereunder persons were allowed fifteen days after the board order in which to withdraw from the union without penalty; if they did not avail themselves of the opportunity to withdraw, they were required as a condition of employment to retain their membership in good standing. Persons hired at a later date who voluntarily became union members also were to retain membership in good standing. This plan gave a considerable degree of freedom for individual workmen in that members had an escape period during which to resign; new employees were free to join or not to join as they saw fit. If he was still a member after the escape period, however, a person's job de-

pended on keeping in good standing with the union, which gave the union in a plant a considerable degree of security.

Not only were freedom and union security blended in maintenance of membership, but, as the board saw it, three basic guarantees were provided. These were: (1) the system was a safeguard against disintegration of responsible unions within the country during and after the war; (2) it guaranteed peaceful transition from war to peace through responsible union leadership and stable union membership; and (3) it afforded the chief hope that war production would be converted into production of necessary peacetime goods after the war.<sup>23</sup>

It is somewhat difficult to follow the reasoning of the board with respect to the second and third items. Whether maintenance of membership helped in conversion of production after the war probably cannot be proven one way or the other. As to the guarantee of a peaceful transition after the war, such was clearly not the case; the period was marked by extremes of disputes and stoppages. The only argument is that the situation might have been worse without such clauses—that too is debatable.

The enactment of the War Labor Disputes Act did not alter the functioning or rulings of the board on questions of union security. Eventually a standardized provision on maintenance of membership evolved. Although the clause was of considerable length, the more important sections were as follows:

"All employees who, on (insert date—15 days after date of directive order), are members of the Union in good standing in accordance with its constitution and by-laws and employees who become members after that date shall, as a condition of employment, maintain their membership in the union in good standing for the duration of the collective agreement in which this provision is incorporated or until further order of the Board.

"The union shall, immediately after the aforesaid date, furnish the National (Regional) War Labor Board with a notarized list of its members in good standing as of that date.

"The Union, its officers, and members, shall not intimidate or coerce employees into joining the Union or continuing their membership therein."<sup>24</sup>

Thus the maintenance-of-membership clause was well established in the policy of the board before the end of its first year. Within the first eighteen months maintenance of membership had been granted

<sup>23</sup> Stated in the Ryan Aeronautical Company case, No. 46, June 18, 1942.

<sup>24</sup> Bureau of National Affairs, *War-time Wage Control and Dispute Settlement*, p. 322. Washington, D. C., 1945.

in 165 cases. In nearly one-fifth of the cases all employer members concurred, and in over one-third one or more members of the employer group agreed to the award.

Another problem presented itself to the board from time to time, although the issues involved were not so complex as union security; this was the question of how to handle non-compliance with arbitration awards. When such cases arose out of refusal to abide by the ruling of an arbitrator provided for in an agreement between a union and employer, they were simply handled as any other labor dispute. However, where the board directed arbitration as a means of disposing of a case that it had examined, non-compliance with the ruling of the arbitrator was another matter. Then the refusal to comply with the ruling was taken as a refusal to comply with a board order. This meant, as will be shown later, seizure of the plant or facility or perhaps denial of priorities for the procurement of scarce materials.

A principle of some interest was laid down on July 22, 1942, in the decision rendered in the dispute between the J. I. Case Company and the U.A.W., C.I.O. This ruling stated that persons who were not members of the union under a maintenance-of-membership clause nonetheless were required to bring up their grievances under the procedure specified in the agreement. The employer was not to deal separately with non-members on grievances; this was laid down not as a matter of legal right, but rather on the basis that to do otherwise would disrupt healthy collective bargaining relationships.

The ruling in the dispute between the United Shoe Machinery Company, and The United Electrical, Radio and Machine Workers of America, C.I.O., of October 3, 1942, was along this same line of reasoning. One of the points to be ruled upon in this case was the signing of individual contracts covering the same points as the collective agreement. Again, there was no question of the legality of such agreements, but rather of the effect of the practice on collective bargaining and peaceful employer-worker relationships.

In mid-year 1942 another interesting ruling was made.<sup>25</sup> This pointed up the intent of the board that disputes should be settled by collective bargaining whenever possible. In the case, the discharge of four persons was not carried through the grievance procedure specified in the agreement between company and union. Instead the case was taken to the board. That body refused to act in the dispute and directed the parties to submit their issues to the procedures specified in the agreement.

Such cases as those noted above indicate only one phase of the

<sup>25</sup> Babcock and Wilcox Company case, No. 8, August 28, 1942.

work of the National War Labor Board, that which was at first the entire task of the board and later was subordinate in importance to the administration of the Wage Stabilization Program. However, the settlement of disputes remained a difficult part of the work in that there it had more of the job of a mediator to perform than in wage cases. In many instances involving wage questions, the cost-plus contracts awarded by the government procurement agencies and the desire of employers to attract scarce labor to their plants put unions and employers in the same camp, and both in opposition to the board. The war period brought an unusual situation when in many cases labor and management both wanted higher wages and found that they had to "fight Bureaucrats" for permission to raise them.

As far as the settlement of disputes went, the board placed all possible reliance on collective bargaining as the means of best maintaining congenial labor-management relationships. A number of cases have been cited which illustrate that dependence on bargaining; undoubtedly this encouragement of collectively determined agreements to resolve differences was wise and well founded. However, the board could not put all its trust in collective bargaining. It found that even the early attempts to mediate did not bring labor peace in many instances. Throughout the war the questions of union status and union security remained knotty ones over which tempers flared and heated disputes arose. Even though established principles were laid down and the eventual solution of cases taken before the body was clear, there was no complete acceptance of the findings and decisions of the board.

### Enforcement of board rulings

With some objection throughout the war period to the rulings of the board, a means of enforcement had to be found; the prestige of the government and the urgency of effective prosecution of the war made it necessary. In mid-August, 1943, President Roosevelt stated in an executive order and in a public letter to the chairman of the W.L.B. the previously developed policy of the government for the enforcement of directives of the board.<sup>26</sup> According to the President, Congress intentionally left compliance with the War Labor Dispute Act and the directives of the board for executive action. The measures when an employer refused to comply with an order were several. Sanctions in the form of the withholding of contracts and the denial of priorities for goods, fuel, transportation, and the

<sup>26</sup> Executive Order 9370 and the public letter both were dated August 16, 1943 and are reproduced in the Bureau of National Affairs' *Wartime Wage Control and Dispute Settlement*, pp. 30-31.

like were to be tried first. In the event such sanctions did not bring compliance, the plant could be seized and operated by the government. The procedure where non-compliance developed was for the board to notify the Director of Economic Stabilization, who was "to direct the application of any or all available sanctions . . . by the appropriate agencies of the government."

When a local union directed or advised its members not to accept some board ruling, the first step was likely to be efforts by international officers to induce the workers to accept the award and get back on the job. Failure to get compliance in this manner could lead to seizure of the plant; the working conditions in a seized plant were set by board order. When worker or union obstinacy caused the seizure, the board could deny benefits normally accruing to the unions, such as checked-off funds and the like. In any case of seizure, the plant was to be returned to owners as soon as possible and not more than sixty days after the restoration of productive efficiency.

In case the non-compliance was by individuals, the President outlined singularly personal punishments. The War Manpower Commission could be directed to cancel draft deferments or employment privileges. This, like the other means of enforcement, was primarily a threat.

The President closed his letter to the War Labor Board with a comment on the general effectiveness of the board in its decisions. In the eighteen months in which the new body had functioned over a thousand cases had been decided. Of this number, only seven had been sent to the President because of persistent non-compliance. In the eyes of the Chief Executive, this was a "remarkable record, in the making of which the industry, labor and public members of the Board have each played an effective part."

In application, the sanctions to which we have referred were not very effective. Cancellation of war contracts was not an intelligent method of punishment, since it hurt the government as much as or perhaps more than it did the company to be disciplined. The denial of priorities was not quite so harmful to the public but tended to have the same general effect. However, it was not employed often against management recalcitrance and was not used at all in cases of labor defiance. This meant, in the final analysis, that when compliance measures progressed beyond the public pressure and urging of acceptance of awards or rulings of the board, about all that was left was seizure; this could be done without a stoppage of production as would occur with a denial of priorities or a cancellation of contracts.

Nevertheless, seizure was not often used. It will be recalled that only three seizures took place under the old National Defense Medi-

ation Board; under the War Labor Board there were more plants and facilities taken over but the number was relatively small when compared with the total number of cases handled. From the time the new board was created until mid-year 1945, almost three and one-half years, there were thirty-eight seizures reported, twenty-eight under President Roosevelt's administration and ten in the first two months under President Truman.<sup>27</sup> Taking the period as a whole, there was less than one seizure per month, but the number grew from year to year. For example, there were only three seizures in 1942 and there were fifteen in the first five and one-half months of 1945. Especially after V-E Day the relative amount of non-compliance increased, since the public was inclined to "let up" once one theater of the war was cleared of open hostilities. However, the power to seize and operate plants extended, under the War Labor Disputes Act, for six months beyond the legal end of hostilities, which was to be proclaimed by the President or by a joint resolution of Congress, so the power of seizure remained and was used on occasion. Between mid-August 1945 and mid-June 1946 there were nine seizures. Some of these involved large facilities and groups of workers, such as was the case with the railroads, the bituminous coal mines, and the big meat-packing concerns.<sup>28</sup>

The seizures described in the foregoing paragraph were not all alike. They were about evenly divided between those resulting from defiance by labor and from defiance by management. When a seizure was ordered, it might be effected by any designated government agency, chosen on the basis of the nature of the business being taken over. The following government agencies seized and operated plants or facilities in one or more instances: Army, Navy, Office of Defense Transportation, Department of the Interior, Department of Commerce, War Shipping Administration, and the Petroleum Administration for War. The Army did the greatest amount of such work, taking care of about half of the plant occupations. Some of the seizures were of single plants or facilities and others were of hundreds of units, as in the case of the coal mines. In most of the cases the facilities were returned for private operation within a few weeks or months; however, a few instances of management refusal were such as to require several months, and in one case several years,<sup>29</sup> of operation. Generally, once labor had succeeded in provoking the seizure of a plant and certain changes in

<sup>27</sup> "Seizures Pile Up," *Business Week*, June 23, 1945, No. 825, p. 17.

<sup>28</sup> U. S. National Wage Stabilization Board, Research and Statistics Report No. 2, *Labor-Management Disputes, Subsequent to August 17, 1945, Involving Possession of Properties by the Federal Government*. Washington, D. C.: U. S. Government Printing Office, October 23, 1946.

<sup>29</sup> Toledo, Peoria and Western Railroad.

working conditions had been made, the complainants were quite willing to have the plants returned; some managements were more inclined than others to stand on a certain principle and thus give longer periods of opposition.

As far as dispute-settlement methods and improvement of industrial relations are concerned, it is not clear whether the War Labor Board of the second World War left any great legacy. During the first war the espousal of the right to organize, even though in company unions, left a clear, if mixed, resultant of stronger unions and stronger company unions as well. There was, it is true, an increase in union membership during the second World War, but it was due more to legislative policy than to pronouncements of the War Labor Board. There is, however, one practice, attributable in part to the board, that should be noted. The composition and functioning of the board and its predecessor emphasized the merit of tripartite groups for the settlement of management-labor disputes. As has been seen, such groups were not new, having been used in the Toledo Industrial Peace Plan and elsewhere; but this was a plan applied on a national scale for several years. Since the end of the war there has been a sizable continuation of the practice in the growing numbers of local dispute-settlement plans, in fact-finding committees, and in private arbitration plans such as that in effect between the United States Steel Corporation and the United Steelworkers of America. As has previously been noted, the tripartite dispute-settling body has distinct advantages; in popularizing such plans the board did an excellent piece of work.

Perhaps another result should be credited to the board. Certainly maintenance-of-membership clauses are much more common since the war than before. No data on the percentage of union members covered by such clauses were kept prior to 1942. In that year the Bureau of Labor Statistics reported fifteen per cent so covered; this figure increased gradually to twenty-nine per cent in 1945 and dropped to twenty-five per cent in 1946.<sup>30</sup> Since such clauses are a logical compromise between the usual position taken by management and labor on union security, they may continue as an important solution to disputes that threaten over that issue. Such clauses are also a logical step in the line of progression of a union from an open to a union shop agreement.

There is at least one other result of War Labor Board action that is significant enough to note. While the war was in progress the settlement of disputes, once submitted to the board, was very similar to compulsory arbitration. Although the enforcement of board rul-

<sup>30</sup> *Monthly Labor Review*, May, 1947, Vol. 64, No. 5, p. 767.



ings was on a non-legislative basis, the sanctions and pressures that could be used were sufficient to bring unwilling acceptance of many awards. But every time there was unwilling acceptance of a dispute there was likely to be dissatisfaction on the part of one or both parties and a growing intention to remedy the situation just as soon as controls were removed. This was not the only reason, but it was one reason why when controls were removed everything was ripe for an unprecedented wave of labor-management disputes and unrest. It was an easily understood, but nevertheless unfortunate, exercise of the freedom which we prize so highly.

### Questions

1. Is there good reason in an emergency period for the setting-up of special governmental agencies, such as the War Labor Board, to perform functions that existing agencies, such as the Conciliation Service, could assume? Why or why not?
2. Evaluate the maintenance-of-membership clause as a means of solving the issue of union security that arose so frequently during the war period.
3. What are the advantages of a tripartite body representing management, labor, and the public as an agency for settling labor disputes?
4. In view of the stringencies in labor-management relations that were present during the war, would it have been wise to exclude questions of union security from the authority of the War Labor Board? Why or why not?
5. Were the means of enforcing rulings of the War Labor Board adequate? Why or why not?
6. Did the enactment of the War Labor Disputes Act give a better basis for settling labor-management disputes than had existed under the executive action of the President? Why or why not?

## CHAPTER XXII

### STABILIZATION AND CONTROL OF WAGES

#### Federal wage policy prior to World War II

Except for scattered attempts during the colonial period to put ceilings on the wages that could be demanded, prior to 1940 all legislation by federal and state governments directed at wage control had sought to put a floor under wages, that is, to set minimum wages.<sup>1</sup> This was due to the fact that once the nation got beyond the period when labor was especially scarce, and once employers began to grow in size, workers were unable to match bargaining power and the imminent danger became one of excessively low wages rather than excessively high ones.

When the nation began in the 1930's to swing toward a war economy, its labor controls were primarily those that were designed to bolster a peacetime economy plagued by insufficient demand for goods, oversupply of labor, and resultant low wages. An excellent example of this fact was the Fair Labor Standards Act, which was intended to keep hours of labor down and set a minimum wage rate of forty cents per hour for the groups covered. The Walsh-Healy and Davis-Bacon Acts were to ensure payment, on certain government contracts, of at least the prevailing wage rates of the area in which the work was done.

As the war boom took hold, unemployment began to fade, wages and prices to rise, and the demand for goods to increase at the same time that the federal government wished to command a larger and larger share of the national product. If such a situation were allowed to go unchecked it would mean increases in wages and in demand for goods by the public; the government, to get the products it wanted, would have to offer higher prices, thus hoisting the monetary cost of the war. The anti-inflation program of the government ramified into many fields; only wage policies will be noted in this division.

#### The development of a wage stabilization program

In 1942 there was a sharp break in federal wage policy. Beginning in that year the government followed a policy throughout the

<sup>1</sup> See Ch. XII,

war of controlling the wages paid by private enterprise. At no time did the control amount to a freeze of all wages; it was called, more euphoniously and perhaps more accurately, a wage-stabilization program. Small segments of the task were allocated to other governmental units, but the greatest part of the job was administered by the War Labor Board. On January 30, 1942, the Price Control Act directed the various agencies concerned with the problem to work toward a stabilization of wages, costs, and prices. The President, in a message to Congress in April, 1942, also directed the board to control wages as a part of his program to stabilize prices. This was said by the President to mean that, in general, wages should be kept at existing levels, but that the board should give due regard to inequalities and substandards of living.

Using these guideposts, the board began to face wage cases almost from the first day of its existence. At first these cases came as disputes between labor and management as to what should be the amount of the wage increase. At that time the labor market was not sufficiently tight to make most managements willing to raise wages without a protest. There were a few minor cases and then came a demand for a general wage increase for the workers in the little steel companies.<sup>2</sup> This dispute arose over the demand of the union for a dollar per day, twelve and one-half cents per hour wage increase and the refusal of the companies to make any offer at all. The case affected many workers and was in an industry with roughly equalized wages; it was not one in which the reasoning of substandards of living could be applied. It was apparent that many more such cases would arise in the future; therefore, there was need of some rule of thumb to be used in determining just how far wages should be allowed to rise under the stabilization program.

When the case came before the board union representatives tried to get around the stabilization principle by offering the proposal that part of the raise be paid in war bonds. This proposal was not acceptable. In the end, the board allowed five and one-half cents per hour by dint of somewhat unusual reasoning, not all of which is important; a part of it is of interest to us, however, for the general rule laid down thereby. The board found that costs of living had increased fifteen per cent since January 1, 1941; using this date as a base, the members ruled that employees were entitled to a raise sufficient to bring their wage rates back on a parity with the increased cost of living. Nothing was said about how the principle would

<sup>2</sup> *In re* Bethlehem Steel Corporation, Republic Steel Corporation, Youngstown Sheet and Tube Company, Inland Steel Company, and United Steelworkers of America, C.I.O., National War Labor Board Cases, Nos. 30, 31, 34, 35, July 16, 1942.

apply if the cost of living rose still more, as there was every reason to believe that it would.

The board stated that the fifteen per cent increase formula they had evolved was their attempt "to define a solid basis of stabilization, and at the same time to fairly evaluate and correct inequities that have already resulted from the past cycle in the upward movement of prices." They set such an allowable increase and tried to use it as a guide for two basic reasons. One was that they believed the war should be fought without individual groups seeking special privileges; the other was that maximum war production demanded that fair and equitable labor standards not be broken down. This allowable fifteen per cent increase, which referred to average increases and not increases on individual rates, was to become one of the key points in the wartime wage policy of the government. There were, however, several other bases of wage policy that remain to be noted; some were the result of legislation, others of executive policies, and others of board action. The basis of wage policy will be noted first and subsequently the application of that policy by the War Labor Board and other bodies.

The first important legislation on the subject was in the Economic Stabilization Act of 1942.<sup>3</sup> This law dealt with the whole subject of prices and wage control; in so far as wages were concerned, it was very broad, conferring power on the President for regulation and leaving the exact nature of the regulation to be determined by the Executive. The pertinent passage of the act read: "No employer shall pay, and no employee shall receive, wages or salaries in contravention of the regulations promulgated by the President under this Act."

This law changed the situation completely as far as wage regulation was concerned. Prior to that time the only wage questions that had come before the War Labor Board were those on which the parties could not agree, with the result that the dispute had been carried to that body for settlement. Now the situation was that both employers and employees were forbidden to pay or receive wage increases not in keeping with federal policy even though they could agree through collective negotiations to do so. From October, 1942, to the end of the war wages were removed from the field of collective bargaining except in very rare instances when a change could be made without government approval. This change in policy, at a time when pressures for wages increases were becoming very strong, put a heavy burden on the War Labor Board.

<sup>3</sup> Public Law 729; 77th Congress, Chapter 578, 2nd Session, October 2, 1942.

The President acted immediately to lay down the broad policies that were to guide the War Labor Board in controlling industrial wages for the duration of the war. On the day after the Economic Stabilization Act was passed Executive Order 9250 was issued stating executive policy for the stabilization of the national economy.

The order began by establishing the Office of Economic Stabilization, whose job it was to formulate a national anti-inflation policy and to act to coordinate the activities of various government agencies that affected prices, wages, salaries, profits, rents, and so forth. That office is of interest to us only in so far as it served as a guide for the subsequent work of the War Labor Board.

As to wage and salary stabilization, the order went into considerable detail. The essence of that policy and its administration was as follows: (1) no increase or decrease in wage rate (as a result of agreement, collective bargaining, or arbitration) was to be allowed unless notice of the proposed change was given the board and it, in turn, granted approval; (2) the National War Labor Board was not to approve any increase in wage rates prevailing on September 15, 1942, unless the increases were necessary to correct maladjustments or inequalities, eliminate substandards of living, correct gross inequities, or aid in the effective prosecution of the war. There was a further limitation on the power to approve wage rate increases. Where the board had reason to believe that any proposed increase in wage rates would necessitate a change in the price ceiling, the increase, after approval by the board, also had to be approved by the Director of Economic Stabilization.

The third guiding proviso was that the board could not approve a wage decrease that would cut a wage rate below its highest level between January 1 and September 15, 1942, unless the decrease was necessary to correct gross inequities or aid in the effective prosecution of the war. However, the board could establish regulations to exempt small total wage increases or decreases in order to make the administration of wage stabilization more feasible.

Approximately the same controls of salaries over \$5000 per year were provided as for wages. Salaries for any particular work were not to be lowered below the highest amount paid between January 15 and September 15, 1942, unless necessary to correct inequities as an aid in prosecution of the war. No increases in salaries above \$5000 per year were allowed unless approved by the Director of Economic Stabilization. However, a promotion to more responsible work could be accompanied by a higher salary.

A final guidepost may be of interest, although it had no significant effect on the stabilization of wages. In order to correct gross inequities and to provide for greater equality in contribution to the war

effort, the Director of Economic Stabilization was "authorized to take the necessary action, and to issue the appropriate regulations, so that, in so far as practicable no salary shall be authorized . . . that . . . exceeds \$25,000" after the payment of taxes and certain other specified expense.

The War Labor Board was given the great bulk of the work of administering the policies laid down by the order. It was to continue to carry out the duties outlined in Executive Order 9017 that created the board. It was also designated as the "agency of the Federal Government authorized to carry out the wage policies stated in this Order, or the directives on policy issued by the Director" (of Economic Stabilization). Furthermore, no provision with respect to wages contained in any labor agreement was valid except with the approval of the board.

Small wonder, after the issuance of Executive Order 9250, that the settlement of war time labor disputes became for the board a relatively unimportant job. That order threw all wage changes in its lap at a time when the pressure for wage increases was extreme. Sweeping power was given, but exactly what some parts of the order meant was never clear. For example, when did an inequity cease being one that was too small to warrant a wage increase and become a gross inequity that did warrant a change? Or what was a sub-standard of living? Or how could it be said that one policy would aid the war effort and that another would not? As will be seen, some rules of thumb were used in applying the criteria for approval of wage rate increases, but they were not very clear bases for judgment.

While it seemed clear from the wording of Executive Order 9250 that all workers were subject to its wage provisions, railway workers were brought under it by a specific order a few months later.<sup>4</sup> The essence of this directive was that any change in railway wages, even though made in complete conformity with the specific legislation and orders applicable to them, must conform to the standards prescribed in Executive Order 9250. However, ensuring that railway wage changes met the requirements was in the future to be the job of the National Railway Panel.

Executive Order 9250 did not hold the line effectively against increases in prices and wages. Therefore, in April, 1943, the President again attempted to pep up the stabilization program with a new order.<sup>5</sup> This new directive was referred to as the "hold-the-line order"; it was to stop the inflationary spiral, which, according to the President, had only been slowed down to that date. The order

<sup>4</sup> Executive Order 9299, dated February 4, 1943.

<sup>5</sup> Executive Order 9328, dated April 8, 1943.

directed the establishment of price ceilings, based on September 5, 1942, prices where possible. This, it was hoped, would relieve some of the pressure for higher wages. As far as wages were concerned, the War Labor Board and other agencies participating in the stabilization program were directed "to authorize no further increase in wages or salaries except such as are clearly necessary to correct substandards of living, provided that nothing herein shall be construed to prevent such agencies from making such wage or salary readjustments as may be deemed appropriate and may not have heretofore been made to compensate, in accordance with the Little Steel Formula as heretofore defined by the National War Labor Board, for the rise in cost of living between January 1, 1941, and May 1, 1942." However, this did not prohibit reasonable adjustments of wages and salaries in cases of promotion, reclassification, merit increase, and the like, if the changes would not change production costs enough to form a basis for demands for price increases.

The hold-the-line order completed the legislative and executive statement of federal wage policy for the war period. There were a few slight changes from time to time, but the problem for the last two and a half years of the war was application of the policy. This was not done with perfect consistency. The War Labor Board and all other branches of the government essentially fought a delaying action rather than completely stopping wage and price increases.

Under the stabilization programs and policies that were issued, a limited number of bases of wage adjustment emerged. These conditions included increases: (1) directed at correction of substandards of living; (2) made under the "little steel" formula; (3) necessary to correct intra-plant inequities; (4) up to the minimum of the tested and going rate, or in rare and unusual cases some point above the minimum; (5) on the basis of promotions, reclassifications, and the like.

With five possible justifications for upward wage revisions, it was possible in most instances where a change seemed necessary to find a reason to grant such an increase. However, considering the economic pressures of the war period, a good job was done of wage and price stabilization up to the end of the war. Let us note the manner in which some of the policies were applied.

As has been stated, the Stabilization Act of October 2 and Executive Order 9250 of October 3, 1942, marked the beginning of a concerted effort to stabilize. Prior to that time there had been commitments to stabilize and a "little steel" formula had been evolved, but efforts were not concerted until fall, 1942. Early in October the board issued general orders allowing all wage increases approved

prior to October 3 to be put into effect.<sup>6</sup> Increases appearing after October 3 were to be included if they had been agreed to and formally communicated to employees before that time.

Shortly thereafter the board issued an order that was intended to simplify its work. It directed that all employers of not more than eight were exempted from the provisions of Order 9250.<sup>7</sup> This exception was not to apply to employees whose wages and working conditions had been established on an industry or association basis under a master agreement, and regional War Labor Boards were allowed to recommend that certain employer groups in their region not be covered by the above exemption where it would have served to obstruct the stabilization policy. Under this provision, almost fifty groups of small employers in various regions were denied exemption, that is, they were governed by Order 9250 even though employing no more than eight persons. This included almost every imaginable group in one region or another; on the west coast, where the labor market was especially tight, there were more exceptions to the order than in any other part of the country; that is, more small employers were held subject to the controls of Order 9250.

#### Means of paying more money to workers

As needs for labor became more keen, the practice of employers was to try to fulfill their requirements by offering more money. Such a practice could not be followed at will; sometimes in order to lure workers attempts would be made to hire for new jobs at premium wages in excess of the established rates. It could be argued that such measures were not a violation of the wage-stabilization program, but the board ruled otherwise.<sup>8</sup> The practice was ruled to be a violation of Order 9250.

The payment of bonuses proved to be quite a problem for the board. This was another possible means of attracting or keeping labor where outright higher wages could not be paid. The board ruled<sup>9</sup> that bonuses could be paid to employees who had been paid them in the past if the grants were not greater than they had been in the preceding bonus year. This did not prohibit any employer, even though he had not done so before, from paying a Christmas or year-end bonus up to \$25 without board approval. Also, the payment of a bonus to an employee quitting his job to enter the armed forces was permissible.

<sup>6</sup> National War Labor Board, General Orders 1 and 3, October 7, 1942.

<sup>7</sup> General Order 4, October 9, 1942.

<sup>8</sup> General Order 6, October 3, 1942, amended June 27, 1944.

<sup>9</sup> General Order 10, November 6, 1942.



It is common knowledge that in many cases women are paid less than men for work of comparable quality and quantity. During the war, with the concerted desire to get all possible women to take jobs in industry, it became necessary to adjust the wages of women in order to make such work more attractive. The question arose as to whether such adjustments required board approval; the board ruled that they did not.<sup>10</sup> The equalizing grants could be made provided that they were not used as a basis for raising price ceilings and provided also that they were subject to review by the board if it so chose. This ruling was written into Order 9328 when it was issued in April of 1943. It had no effect on the general position previously taken by the board.

Equal pay for equal work was not easy to apply, for it involved a problem of job evaluation. It would not be a case of equal pay for equal work if women and men were working at the same machines and at the same rates but a helper was provided to do the heavier lifting for the women. The principle of equal pay also was applicable only for intra-plant inequities; inter-plant differences gave no basis for upward revision of women's wages.

Some agreements between unions and management provide that wage rates are to be revised upward when certain amounts of increase in the cost of living occur. However, the board put a stop to such practice.<sup>11</sup> Even though called for by a collective agreement, no cost-of-living wage-rate increase was allowed without board approval, which would not be granted in case the increase would amount to more than was allowable under the "little steel" formula.

It has been noted that in all executive orders on the subject, wage increases to eliminate substandards of living were permissible. However, there was no indication of just what constituted a substandard of living. The board issued a rule of thumb to be used that was far from overly generous.<sup>12</sup> It was ruled that rates could be raised to fifty cents per hour without approval. However, an employer could not raise all his wages to maintain the same differential between each class of employees simply because the raise to fifty cents per hour had narrowed the differential at the bottom. Such raises had to go before the board.

A series of three general orders issued in October, 1942, and February, 1943, proved to be about the most complicated and perhaps the most elastic of all such statements.<sup>13</sup> These allowed wage ad-

<sup>10</sup> General Order 16, November 24, 1942.

<sup>11</sup> General Order 22, December 8, 1942.

<sup>12</sup> General Order 30, February 18, 1943.

<sup>13</sup> General Orders 5, 9, and 31, October 5 and 30, 1942, and February 2, 1943, respectively.

justments for individual employees under a number of conditions without approval by the board. General Order 5 allowed wage increases "incident to the application of the terms of a wage agreement" if they were due to: individual promotions or reclassification, individual merit increases, length-of-service increases, or increased productivity under an incentive plan. Order 9 made similar allowances for individual increases of *bona fide* executive, administrative, and professional employees. In both of these orders it was specified that any increases resulting from the order were not to increase production costs appreciably and not to serve as basis for a demand for an increase in price ceiling.

General Order 31 really was a supplement to orders previously issued allowing non-approved individual wage increases. It was long and complicated and will only be outlined here. It allowed individual increases in wage and salary rates as a reward for improved quality and quantity of work or service. There were separate provisions for employees of fewer than thirty workers and those hiring more than that number. Stripped of excess verbiage, the individual increases were allowed, but they were not to amount to more than ten cents per hour for any employee or to more than an average increase of five cents per hour for all employees in the establishment whose wages were subject to the jurisdiction of the board. In addition, leeway was allowed in the section of Order 6 which had required that employees be hired at the beginning rate for the job classification for which they qualified. Under Order 31, in any one year twenty-five per cent of the persons hired could be started at rates in excess of the minimum for the classification.

A final general order remains to be noted; late in 1941 the rulings with regard to piece-rate wage-payment systems were changed.<sup>14</sup> The establishment of a new piece-rate plan in a plant or department not previously having such plans required board approval in accordance with the order, but there were some cases in which approval was not necessary. These cases were those in which there was only a rate change due to a change in method or product; however, the changed rate had to reduce to the same earnings for the same effort. A second case in which board approval was no longer required was in establishing an incentive rate for a new production item in a part of a plant where an incentive plan already was in operation. Here, again, equivalent earnings had to be maintained for equivalent effort.

Such were the general orders by which the board outlined the policy which it and the Regional War Labor Boards followed. Many of the orders were amended from time to time rather than re-

<sup>14</sup> General Order 38, October 23, 1944.

maintaining as issued, and occasionally an order shifted the emphasis or functioning of a preceding one. All in all, there was a continuous search for some way of staving off the big, inflationary, general wage increases while still leaving room for the rewarding of initiative and effort. There was also a recognition that there were certain limits as to how minute administration could be while remaining practical as far as time and personnel were concerned.

A number of general orders of the board were issued to delegate authority so that the work load could be lightened. One of the early instances of this practice was found in General Order 13, of October 13, 1943. This document implemented a provision of Executive Order 9250 by stating the conditions which were to govern the nine-man Wage Adjustment Board for the construction industry. This body was given the job of administering the wage-stabilization program in the building and construction industry under the rules laid down by the War Labor Board and subject to review of its actions by the board. Attention has already been called to an essentially similar plan by which the National Railway Labor Panel did the stabilization job for railway workers.

A number of such orders beginning in late 1942 authorized one after another of the government departments and agencies to adjust wages of their employees, according to the principles of the wage-stabilization program. Finally, virtually all government agencies were given authority to make such adjustments. Agencies and departments delegated such power were to make their changes in keeping with the national stabilization program, as outlined in Executive Orders 9250 and 9328 and the subsequent actions taken thereunder.

In addition, the National War Labor Board and some of the Regional War Labor Boards appointed boards or commissions, created with less formality than by general orders, to administer the wage stabilization and aid in the settlement of disputes in certain industries on a national or regional basis. The rather standard provisions that the wage program would be observed and that the action could be reviewed by the national board were included in the documents creating such committees. The national board set up panels in daily newspapers, printing, publishing, airframes, telephones, non-ferrous metals (ninth, tenth, and Alaskan regions), shipbuilding, trucking, and waterway shipping. In addition, commissions were created for aircraft and lumber on the west coast. One region, number 11, created a tool and die commission and an "automotive section."

#### The application of wage-stabilization policies

Although the general orders sketched in the foregoing section gave the policy by which the board and its agencies were to govern

their actions, there were frequent differences between policy and practice; an examination of a few wage cases will show this. For example, the application of the "little steel" formula showed considerable elasticity; in the original "little steel" ruling, when the allowable increase of fifteen per cent above January, 1941, was stated, little steel employees were actually allowed more than a fifteen per cent increase. An increase of 3.2 cents was permissible to raise their wages to fifteen per cent above January, 1941; the board allowed an additional 2.3 cents per hour for what it referred to as "time equities." This meant that had the case been handled promptly after it was filed in February, 1942 (before the President directed the stabilization of wage rates), a larger increase would have been granted. A few months later exactly the same raise was allowed United States Steel on the basis that "wage policies in basic steel plants customarily follow industry-wide pattern."<sup>15</sup> However, in this case the request for an increase was not made until after the President's stabilization message of April, 1942, and no "time equity" was involved; even so, an increase amounting to more than fifteen per cent was granted.

Sometimes questions arose as to precisely how much of a raise workers in a plant were entitled to, since it was not common for increases in wage rates to equal exactly fifteen per cent, and in many cases wage increases put into effect were not paid to all, or even a majority, of workers. The fifteen per cent allowed was a general increase and not the individual increases that might be given for merit or reclassifications. However, in 1943 rather widely divergent rulings were given on this point. In February it was stated that increases in day rate benefiting one-third of the employees in a company should not be considered in determining the amount of the cost-of-living adjustment under the "little steel" rule.<sup>16</sup> However, a few months later the board said that increases awarded to as few as ten per cent of the employees should be prorated among all employees in determining just how much of a general increase was due under the fifteen per cent rule.<sup>17</sup>

In the latter case the board put certain strings on the granting of the fifteen per cent increase. Under that ruling, an increase of 8.8

<sup>15</sup> *In re Carnegie-Illinois Steel Corporation, Columbia Steel Company, The American Steel and Wire Corporation of New Jersey, National Tube Company, Tennessee Coal, Iron and Railroad Company, and The United Steelworkers of America, C.I.O.*, No. 364, August 26, 1942.

<sup>16</sup> *In re Continental Rubber Works (Erie, Pa.) and United Rubber Workers of America, Local 61, C.I.O.*, National War Labor Board Case No. 402, February 2, 1943.

<sup>17</sup> *In re Federal Bearing Company, Inc., Schatz Manufacturing Company (Poughkeepsie, N. Y.), and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Local 297, C.I.O.*, National War Labor Board Case No. 270S-D, July 7, 1943.

cents per hour was due according to the "little steel" formula. However, the board ruled that this entire amount could not be spread equally over all employees; five cents could be granted as a general increase, but the remaining 3.8 cents were to be used for the elimination of intra-plant inequities. This latter task was to be done through negotiations; the board expressed the opinion that it would be most equitable if the bulk of the amount available for this purpose be awarded to those employees who were "underpaid in relation to other workers in the same plant." Thus, the "little steel" increase did not mean a full fifteen per cent increase for everyone in the particular plant.

On some occasions the board allowed considerably more than the fifteen per cent wage increase even though inequities or substandards were not present. An outstanding case of this type came early in 1943;<sup>18</sup> in that instance the board, with public members dissenting, granted approval of a wage increase after a raise of well over fifteen per cent had been given earlier. The total increases amounted to nearly thirty per cent; the case made in requesting the increase was that the company had lost personnel and would lose more to other plants if it was not allowed to raise wages. Although the board had declared that it would not attempt to remedy manpower shortages through wage increases, the boost was granted in this case for no other discernible reason.

The above cases are a very few of many, but they show that even where the "little steel" formula was supposed to guide it did not always do so. In many cases it was applied and used effectively, but in many others it was not. Even where it was applied and no increases were allowed for inequities, substandards, and the like, it did not keep earnings down. This was due to the fact that hours of work and the steadiness of work changed greatly. Between 1940 and 1944 average weekly hours of work in all manufacturing increased from less than forty to approximately forty-five. This increase was more significant than it seems, owing to the fact that the Fair Labor Standards Act required that hours over forty per week be compensated at time-and-a-half. Thus, an increase of from forty to forty-five hours per week would bring pay for seven and one-half additional hours. The average increase in hours worked was somewhat greater than that, so the total increase was more than twenty per cent of straight-time earnings; in some war industries the upward tendency was much greater.

In applying the rule that wage rates could be raised when there

<sup>18</sup> *In re American Smelting and Refining Company* (Long Island City, N. Y.) and Federal Labor Union, Local 22414, A. F. of L., National War Labor Board Case No. BWA-114, January 4, 1943.

were inequalities or gross inequities, the board had a very elusive dilemma that was impossible of exact definition. Such inequalities or inequities were said to exist where there were wage differences so discriminatory as to make their continuation a manifest injustice. One application of this principle was that all employees in a certain classification should be paid the same wage for equal quantity and quality of work, "regardless of color, race, sex, religion, or national origin."<sup>19</sup> In one case, an inequity increase was allowed when wages within a certain plant were compared with others in the area or industry.<sup>20</sup> However, in another ruling within two months of this decision the board denied a request for a wage increase based on a comparison with wages of other industries within the area.<sup>21</sup> Shortly after this, it will be remembered, the President, in Executive Order 9328, removed inequities as one of the justifications for wage increases. However, this regulation did not long eliminate the granting of inequity increases. On April 12, 1943, the Director of Economic Stabilization issued a policy directive to clarify the wage adjustment powers of the board under Order 9328.<sup>22</sup> This statement put the board back about where it was prior to the issuance of 9328 with respect to the leeway afforded in finding inequities. Parts of this directive merit closer examination.

The directive opened with a statement of purpose: to supplement Executive Order 9328. It reaffirmed the power of the board to make adjustments within the fifteen per cent formula and to eliminate substandard conditions of living. However, the board had the power to eliminate differentials or inequities that would impede productive efficiency, such as might develop where the board raised low rates within a plant to eliminate substandards, thus narrowing differentials for higher brackets of wages. Such adjustments were not to bring wage rates above the minimum rate prevailing in the locality for similar work, however. The board was also given the power to raise wage rates in rare and unusual cases where labor for critical war production could not otherwise be obtained. With this directive the board continued in about the same path as it had before.

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<sup>19</sup> *In re* Southport Petroleum Company (Texas City, Tex.) and Oil Workers International Union, Local 449, C.I.O., National War Labor Board Case No. 771, June 5, 1943.

<sup>20</sup> *In re* Jamestown Steel Partition Company (Jamestown, N. Y.) and United Electrical, Radio, and Machine Workers of America, Local 309, C.I.O., National War Labor Board Case No. 430, January 14, 1943.

<sup>21</sup> West Coast Airframe Companies and three union organizations, National War Labor Board Case Nos. 174, 307, 557, 558, 608, 609, 610, and 673, March 3, 1943.

<sup>22</sup> Reproduced in: Bureau of National Affairs, *War Labor Reports*, Vol. 3, p. xiv. Washington, D. C., 1943.

Application by the board of its power to raise wage rates so as to eliminate substandards of living was not uniform. Attention has already been called to the fact that rates of less than fifty cents per hour were considered substandard and could be raised to that figure without individual approval by the board. However, in 1942 that body directed a wage increase of seven cents per hour for a plant in which average hourly wages were sixty-four cents per hour and starting wages forty-six cents.<sup>23</sup> Obviously, many of the workers in the plant were getting more than sixty-four cents per hour, so the desirability of a flat increase to remove substandards was open to some question. On another occasion<sup>24</sup> the board directed a "general across-the-board increase of 12½ cents an hour, where average straight time earnings are slightly less than 50 cents an hour." Strangely enough, the starting wage of thirty cents per hour was increased twelve and one-half cents just as was the wage of persons in the higher income bracket, a peculiar application of the principle of removing substandards.

Actually, if the general definition of a substandard wage means one insufficient to permit the earner with an average sized family to live at a standard of health and decency, the Board should have set this theoretical minimum well above fifty cents per hour. It is not easy to state exactly what is required in a health and decency standard and the cost of items will vary from one locality to another, but annual earnings of perhaps \$1300 that would come from fifty weeks of forty-eight hours at this basic rate would not have provided a decent standard of living during the war. The substandard of living doctrine sounded good but was extremely difficult to apply, and it was applied with rather wide variations.

Where there was no other basis for a wage increase, the board could allow one for the purpose of aiding in maintaining war production. One of the early cases of this type of increase was that allowed to non-ferrous metals companies in the Northwest.<sup>25</sup> Work in non-ferrous metals plants was not pleasant and the pay was low. For that reason the companies found it difficult to hire or keep labor. A concerted plan was undertaken by several government bodies to obtain labor for the industry. The War Manpower Commission restricted the movement of workers from the non-ferrous plants and instituted a drive to recruit workers; the War Production Board

<sup>23</sup> *In re* Mead Corporation, Heald Division (Lynchburg, Va.) and United Mine Workers of America, Local 12244, District 50, National War Labor Board Case No. 60, June 10, 1944.

<sup>24</sup> *In re* Postal Telegraph Cable Company and American Communications Association, C.I.O., National War Labor Board Case No. 543, May 31, 1943.

<sup>25</sup> *In re* Non-Ferrous Metals Companies and International Union of Mine, Mill and Smelter Workers, C.I.O., ten locals, cases decided on October 23, 1942.

closed the gold mines so that their employees could be available for such work; the War Department authorized the furloughing of men who were competent to work in the copper mines. The War Labor Board's part in this plan was to adjust wages upward so that more persons would be drawn to and retained in the non-ferrous metals industry. Under this plan, the board authorized wage increases up to twelve and one-half cents per hour to aid in the procurement of manpower and, thereby, the effective prosecution of the war.

About one year later an interesting decision was rendered on the basis of a "rare and unusual" case in which a wage increase was necessary to allow the company to recruit and hold labor.<sup>26</sup> In this decision the lowest or starting rate was left unchanged while the rates of labor were raised. At the same time it was provided that intra-plant differentials existing before the changes were not to be restored, so that beginning workers were in a relatively worse position than they had been previously.

In a similar vein, in January, 1944, the board approved a decision of the trucking commission to grant an increase of three to four cents per hour to truck drivers in St. Louis, even though the raise due under the "little steel" formula already had been given.<sup>27</sup> The situation was referred to as a "rare and unusual" case, but the reasoning in the opinion centered on inter-city differentials in rates paid to truck drivers. Management and labor representatives voted the ruling over the dissent of two public members.

In other cases pleas for a wage increase as a "rare and unusual" need were denied. There was no one clear method of demarking the situations that were "rare and unusual." In general, they were to be certified as such by the War Manpower Commission, but this was not always the case. This basis of increases was perhaps the most vague of all.

#### Control of salaries over \$5000

Meanwhile, the Commissioner of Internal Revenue had the task of stabilizing the salaries of those whose annual earnings were over \$5000 and of *bona fide* executive, administrative, and professional workers even though their income was less than \$5000 per annum. The rules by which the task was to be accomplished were much the same as those used by the War Labor Board. This meant that the

<sup>26</sup> *In re* the Boeing Aircraft Company (Seattle, Wash.) and International Association of Machinists, Aeronautical Mechanics Lodge 751, Independent, National War Labor Board Case No. 557, September 4, 1943.

<sup>27</sup> *In re* Association of Team and Truck Owners (St. Louis Operators Committee) and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Locals 600 and 725, A. F. of L., National War Labor Board Case No. 24-966, Jan. 24, 1944.



regulations did not apply to enterprises employing eight or fewer workers. Approval of the Commissioner was not necessary for merit or length-of-service increases and promotions or reclassifications or for raises to correct substandards of living, to allow the fifteen per cent provided under the "little steel" formula, or to raise salaries to the minimum of the going rates for similar work in similar plants in the locality. Bonuses were allowed without approval of the Commissioner if the amount or the percentage of the grant was not in excess of the amount or percentage of similar awards in the last accounting year preceding October 3, 1942. State and local governments and the District of Columbia could adjust the salaries of their employees, subject to the authority of the Commissioner, by filing a certificate averring that the increases were in keeping with the program of salary stabilization.

All in all, the salary-stabilization program probably was not so rigidly enforced as that dealing with wages. Certainly under the idea of equality of sacrifice in the prosecution of the war, this was not desirable. However, even the board did not apply its rules with equal vigor at all times, and it is somewhat difficult to follow some of its reasoning. It would have been more desirable to have had a consistent and uniform policy, but with different persons and organizations administering the program under the general control of the Director of Economic Stabilization, it probably was almost impossible to have such uniformity.

#### Control of wages in agriculture

On August 31, 1943, the Director of Economic Stabilization gave the War Food Administration the job of stabilizing wages and salaries of agricultural labor. This authority did not extend to salaries in excess of \$5000 per annum. Although there were similarities between the manners in which the stabilization of agricultural wages and others were effectuated, there were also considerable differences. Probably the most marked difference in the agricultural stabilization program was the fact that increases in agricultural wages and salaries up to \$2400 per annum could be made without approval of the administrator. However, the administrator had the power to lower this upper limit of free movement for certain groups in certain areas. The failure to freeze wages below \$2400 was said by the administrator to be justified on three grounds: (1) wages and salaries in agriculture tended to be substandard; (2) a high disparity existed between agricultural wages and those in non-agricultural war work; and (3) the recruitment and retention of agricultural labor was a necessity for the production of adequate amounts of goods.

Officially, the stabilization program in agriculture applied even to employers of one worker. The Director of the Office of Labor in the War Food Administration was empowered to appoint State W.F.A. Wage Boards with authority to pass on applications for increases or decreases in agricultural wages. As noted previously, it was possible to set wage ceilings below the \$2400 per annum figure. For such a ceiling to be established, a hearing by the appropriate wage board was to be held. Such meeting could be called on petition from the agricultural employers of a certain area or it could be held on the action of the wage board, but the ceiling could be recommended to the administrator only if a majority of the producers that would be affected so requested. However, even when filed, the recommendations were not binding on the administrator.

An increase in salary or wages higher than \$200 per month or \$2400 per annum required prior approval of the administrator, as did payment of more than the local ceiling if such were in effect. The burden of proving the desirability of a requested increase was upon the employer. The regulation of farm wages was like that of other types of employment in that increases in wages could not be used as a basis for price relief. Also, wage and salary payments for a certain type of job could not be lowered below the highest rate paid between January 1 and September 15, 1942.

### The effectiveness of wartime wage controls

The stabilization program of the federal government during the war was rather successful. A static condition was not maintained either for wages or prices but they were kept on a surprisingly even keel for the duration of the shooting war. Probably the most effective job was that done on wage rates. Officially, the "little steel" formula stuck during the entire war period; however, as we have noted, there were other bases of adjustment that allowed many instances of increases beyond its figure; as the war progressed, the formula was used less and less frequently as a basis for increases. And by the end of the war it was not a sound basis for wage adjustments since the over-all cost of living stood thirty per cent above the 1940 figure, while for food the increase had been forty per cent.<sup>28</sup>

The fact was that the government had simply made a good try at control; there was no doubt that this was worth while and that it should have been done. But the adherence to the fifteen per cent increase in wage rates and the philosophy advanced when it was first used were not realistic. Clearly, the government did not succeed in holding prices at the April, 1942, level. Therefore, if the

<sup>28</sup> *Monthly Labor Review*, July, 1947, Vol. 65, No. 1, p. 124.

purpose of the government had continued to be to allow wage-rate increases paralleling the rise in the cost of living, the situation got out of hand.

This failure to maintain the relationship between wage rates and the cost of living gave workers—especially union men—a strong basis for criticism after the war, at which time large wage increases were demanded. But for the period of the war there was another angle to the story. It has been pointed out that weekly hours of work increased sharply during the war and that most of this added work time was compensated at time-and-a-half. In addition, there was a great deal of upgrading during the war; promotion came rapidly, in part because new and more responsible tasks were learned, and in part because promotions were necessary in order to keep scarce manpower. Therefore, in the early months of 1945 average weekly earnings in manufacturing were about seventy-five per cent above the level of January, 1941.<sup>29</sup> Although it took more work and in many cases greater responsibility to earn their wartime living, most workers were much better off in terms of a standard of living during the war than they had been before.

This improved status was certainly due in part to the stabilization program of the government. However, the degree of unionism among workers assuredly also was partly responsible. Many of the raises in the later stages of the war were given entirely voluntarily and would have been requested even without a union, but there is little question that unions did aid in improving the lot of workers during the war.

#### Federal wage policy after the war

When the end of the war came near the philosophy of labor and management began to change and the task of wage stabilization became a more perplexing problem. Workers and unions began to think about cutbacks in government orders, with resultant unemployment or declines in the work week that would occur at least during the reconversion period and perhaps for longer. They wanted a free hand to go after wage raises. Management, too, wanted an end to government control and freedom to deal with workers as it saw fit.

The President and his advisors were inclined to agree to the desirability of turning the wage question back to the parties involved as soon as possible. Four days after the Japanese surrender, President Truman made the first move in that direction.<sup>30</sup> In an execu-

<sup>29</sup> *Monthly Labor Review*, September, 1946, Vol. 63, No. 3, p. 470.

<sup>30</sup> Executive Order 9599, dated August 18, 1945.

tive order he declared it to be the policy of the government to exercise the controls necessary to prevent inflation or deflation while making any practical changes in controls necessary for an orderly transition from war to peace. Section IV is of the most interest to those surveying wage stabilization; it provided:

"The National War Labor Board, and such other agencies as may be designated by the Director of Economic Stabilization . . . are authorized to provide that employees may, through collective bargaining with duly credited or recognized representatives of the employees involved or, if there is no such representative, by voluntary action, make wage or salary increases without the necessity of obtaining approval therefore, upon the condition that such increase will not be used in whole or in part as the basis for seeking an increase in price."

The order also directed the approval of increases that were necessary "to correct maladjustments or inequities which would interfere with the effective transition to a peacetime economy."

Government approval was still required for increases that would necessitate a price increase. In a subsequent clarification<sup>31</sup> it was provided that, after a trial period of six months, a wage increase could be used as a basis for price relief if the experience of that period had shown a necessity for such increases in price.

The board announced in December, 1945, that the cost of living had increased thirty-three per cent since January, 1941. Therefore, the principle on which wage increases were to be allowed under the new regulations, even though such rises would affect price ceilings, was to allow a thirty-three per cent increase in wage rates above those prevalent in January, 1941.

On December 31, 1945, the National War Labor Board ceased to exist; however, its personnel and functions were inherited by the newly created National Wage Stabilization Board.<sup>32</sup> As events developed, the latter was only an agency for closing up the government's wage-stabilization shop, although it was supposed to reinvigorate wage stabilization. It retained the same general form and organization as its predecessor and began to work under the same principles. However, these were soon softened. Executive Order 9697, dated February 14, 1946, and supplementary regulations issued thereunder by the Economic Stabilization Director permitted wage increases for the following reasons, even though they might require price adjustments: (1) increases to make wage rates consistent with the wage pattern in the industry or local area; (2)

<sup>31</sup> Executive Order 9651, dated October 30, 1945.

<sup>32</sup> Executive Order 9672, dated December 31, 1945.

increases to correct gross inequities; (3) cost-of-living increases necessary to aid in the effective transition to a peacetime economy; (4) increases to correct substandards of living; and (5) increases falling within standards in effect prior to August 18, 1945.

In this plan there were several ameliorating changes. One was the approval of increases to bring rates in line with the general wage pattern. The "gross inequities" basis thus was broadened to allow correction of gross inequities between related industries in a locality or in a larger area.

General Order 1 of the Stabilization Board, effective February 21, 1946, allowed employers to give wage increases until March 15 without prior approval if they in turn filed their request for price relief within thirty days after the wage boost was first reflected in payrolls. A few months later this was made a continuing opportunity for employers wishing to raise wages.

In the summer of 1946 Congress refused to extend the existing price control act. A few weeks after the law had been allowed to lapse it enacted much weaker controls. Since the only effective way of applying wage controls was through restrictions on the adjustment of price ceilings, the experiment was for all practical purposes dead. The board continued to issue statements and to take official action, but these were of little importance, and the body came to a legal end in the winter of 1946.<sup>33</sup>

Actually, the Wage Stabilization Board added little of positive value to the story of government wage controls. Although the War Labor Board had to combat considerable public opposition, it was nothing like that which faced the Wage Stabilization Board. War is a great coordinator of national goals and ideals; in peace, regardless of the degree of crisis that may face the nation, the same degree of coordination is difficult if not impossible to obtain. That was the problem of the new board. It is clear that, from the standpoint of the most orderly reconversion, controls were removed too quickly. However, it is equally clear that if the government was going to default in its stated aim of stabilizing prices and cost of living there was no sound basis for retaining strict controls over wage rates.

It may be argued that if wages had been kept under control prices would not have gone so far out of line. The validity of this argument would vary widely from plant to plant and industry to industry, depending on the percentage of total costs made up of wages, the amount of profit being taken, the reducibility of other costs, and so forth. However, there were many instances of price rises during the postwar period that seemed to be more than just sufficient to

<sup>33</sup> Executive Order 9809, dated December 12, 1946. Previously all wage and salary controls had been abolished by Executive Order 9801, dated November 9, 1946.

cover the added costs of higher wages. Coming years will yield some information as to the extent of profit taking after the war; the general level of profits, however, has shown itself to be high, probably excessive in many instances. Failure to control wages after the war gave a convenient talking point to explain many, perhaps most, price rises; it did not by itself ruin our economy. The complete failure to continue adequate stabilization during reconversion did cause much hardship to the public that need not have been endured had the nation not been so anxious to "get back to normal."

### Questions

1. Was it economically wise to attempt a strict control of wages during the war period? Why or why not?
2. Was it economically wise to abandon wage and price controls after the war as rapidly as was done? Why or why not?
3. How sound and reasonable were the bases on which wartime wage increases were permitted? Why do you believe each reason sound or unsound?
4. What is the relationship between wage rates and manpower supply? To what extent should manpower-supply problems have influenced board rulings on wage-rate increases?
5. The War Labor Board had authority only over wage rates. As an anti-inflation measure, what was the major weakness in this restriction of authority to rates?
6. What is your reaction to the wartime policy of limiting net salaries to a maximum of \$25,000 per year? Explain.

## CHAPTER XXIII

### CIVILIAN MANPOWER PROBLEMS AND CONTROLS

#### The growth of the war manpower problem

Another type of wartime labor problem that was fully as complex as labor-dispute settlement or stabilization of wages was that of manpower.<sup>1</sup> It included problems of allocating manpower to military and civilian occupations, influencing, if not determining, in what civilian industries persons should work, ensuring the use of labor reserve groups such as women, retired persons, racial minorities, and the like, and ensuring efficient utilization of civilian labor. In view of the fact that manpower problems were to such a large extent local problems, the development of a national manpower program turned out to be quite a knotty dilemma.

The manpower shortage developed slowly and did not assume a serious complexion until after the start of the war. Although there had been rapid increases in production and employment in 1940 and 1941, we entered the war with nearly four million persons still out of work. Even with that amount of unemployment there still could be very real manpower problems in certain areas, such as recruiting enough labor for a new plant or facility or training persons to do new and different jobs. However, despite the local situations that were developing, we entered the war with the national manpower problem still in a relatively easy condition. This situation changed rapidly.<sup>2</sup>

Between December, 1941, and April, 1942, stepped-up production and conversion to war goods and the drafting of workers into the armed forces began to have their effect. By the spring of 1942 manpower requirements had assumed such large proportions, claims on the nation's manpower resources had become so competitive, and so many different governmental agencies were assuming authority

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<sup>1</sup> This chapter confines itself, in so far as a separation can be made, to civilian manpower problems and controls. The power of selective service and the actions that it undertook were on an entirely different basis from those taken in trying to solve civilian manpower problems.

<sup>2</sup> Much of the information used herein was drawn from unpublished manuscripts, reports, and studies in the files of the writer, who worked with the Manpower Commission prior to entering the armed forces. These sources are not cited.

over segments of manpower policy, that there was a clear need for a single governmental agency to be responsible for the mobilization, allocation, and utilization of the nation's manpower.<sup>3</sup>

### Creation of the War Manpower Commission

Recognizing these facts, the President acted in April, 1942, to create the War Manpower Commission.<sup>4</sup> Under his order, a commission was set up under the chairmanship of the Federal Security Administrator, Paul V. McNutt, composed of representatives of the War, Navy, Labor, and Agriculture Departments, the Selective Service System, the Civil Service Commission, and the War Production Board. Thus, a place was allowed on the new commission for each of the agencies that would be directly affected by an integrated manpower program.

The chairman was the only person of the commission who devoted his full time to developing and applying a national manpower program. In order to do this and to carry out the functions prescribed in Order 9139, a considerable staff was assembled to do the research and spadework on the development of policies and to administer them once they were approved. The function of the commission was to deliberate on the broader aspects of national manpower policies and to represent the interests of other agencies that might be infringed upon by a certain manpower policy. To cite two hypothetical examples, the Selective Service System would have been greatly interested in a proposed policy that only males between the ages of eighteen and forty years be used in the shipyards. Or the Labor Department would have objected to a plan to develop in the Manpower Commission a dispute-settling agency on the grounds that labor disputes were wasteful of manpower. Beyond representing the interests of other agencies, the members of the commission were also able to provide a greater degree of coordination between the commission and these agencies than probably would have existed without their being allowed to sit on it and to aid in determining and being acquainted with manpower policies.

The order creating the War Manpower Commission directed that it do the following:

"a. Formulate plans and programs and establish basic national policies to assure the most effective mobilization and maximum utilization of the Nation's Manpower in the prosecution of the war; and issue such policy and operating directives as may be necessary thereto.

<sup>3</sup> For a brief survey of the history of the W.M.C. see: "The Activities of the War Manpower Commission," U. S. Employment Service, Department of Labor. Washington, D. C., December 31, 1946.

<sup>4</sup> Executive Order 9139, dated April 18, 1942.



"b. Estimate the requirements of manpower for industry; review all other estimates of needs for military, agricultural, and civilian manpower; and direct the several departments and agencies of the Government as to the proper allocation of available manpower.

"c. Determine basic policies for, and take such other steps as are necessary to coordinate the collection and compilation of labor market data by Federal departments and agencies.

"d. Establish policies and prescribe regulations governing all Federal programs relating to the recruitment, vocational training, and placement of workers to meet the needs of industry and agriculture.

"e. Prescribe basic policy governing the filling of the Federal Government requirements of manpower excluding those of the military and naval forces, and issue such operating directives as may be necessary hereto.

"f. Formulate legislative programs designed to facilitate the most effective mobilization and utilization of the manpower of the country; and, with the approval of the President, recommend such legislation as may be necessary for this purpose."

As a nucleus around which to build the new commission, the Executive Order transferred to it the portion of the Labor Division of the War Production Board that had been doing labor-supply work, the Civil Service Commission's National Roster of Scientific and Specialized Personnel, and the Office of Procurement and Assignment of the Office of Defense Health and Welfare Service. This left the U. S. Employment Service and the Selective Service System outside the commission.

Since the commission had the job of gathering a staff prior to embarking on most of the above program, its first months were marked by relatively slow development. Its task was to coordinate and direct the relevant functions of various government agencies concerned with manpower aspects of the war program. But the original order left the commission in a very weak position in that it controlled none of the more significant agencies that were active in mobilizing, training, and placing the manpower of the nation. Consequently, before its first year had ended it went through two reorganizations that gave it more direct control over needed functions. The first of these moves<sup>5</sup> gave the chairman the job of directing the United States Employment Service, the National Youth Administration, the Apprenticeship Training Service, and the Training-within-Industry Service. With these agencies as parts of the commission it was possible to do a better job of controlling the placement and training of workers in a manner in keeping with national needs.

There still was a big need for a change in the commission. The

<sup>5</sup> Executive Order 9247, dated September 17, 1942.

Selective Service System was busily engaged in withdrawing millions of men from our civilian labor force; there was a coordination of efforts between the two agencies, but it left much to be desired nevertheless. To take care of this situation and make other improvements, the President issued another executive order directing still further changes in the commission.<sup>6</sup> By this order, the Selective Service System became an integral part of the commission. Voluntary enlistments in the armed forces were banned, and the chairman of the W.M.C. was given complete authority over the recruiting and hiring of workers. The order also modified the composition of the commission; henceforth it was to include representatives of the War, Navy, Agriculture, and Labor Departments, the Federal Security Agency, War Production Board, Civil Service Commission, National Housing Authority, and a joint representative of the War Shipping Administration and the Office of Defense Transportation.

In this order the W.M.C. reached essentially its final form and composition.<sup>7</sup> It now had control of the more important agencies that were interested in the organization of the labor market, allocation to civilian and military needs, and the training of those who needed training. The commission's job was no longer a matter of coordinating the action of independent agencies, but rather of directing the activities of agencies under its supervision.

### The development of manpower policies

From the outset it was clear that in order to meet the manpower requirements of the armed forces and the munitions and other essential industries, the commission had to plan for an expansion in the size of the labor force and a reallocation of groups within that enlarged labor force. This expansion and redistribution could not be effectively guided without a comprehensive and accurate body of information concerning the location and qualifications of the nation's manpower reserves. The success of recruitment, allocation, and training efforts depended in large part on the adequacy of labor-supply information; therefore, during its first year those directing the actions of the commission's employees made special efforts to strengthen and expand existing labor market reporting practices as a basis for program planning.

Expansion of the labor force necessitated the development of a threefold program: (1) special efforts had to be made to recruit new entrants into the labor market; (2) whenever necessary, these new

<sup>6</sup> Executive Order 9279, dated December 5, 1942.

<sup>7</sup> The Selective Service System, however, was restored to its independent status, as of December 5, 1943, by Public Law 197.

entrants had to be trained adequately to meet the employers' minimum job specifications; and (3) employers had to be convinced of the necessity of lowering entrance specifications and of diluting their customary work force with the largest possible number of inexperienced and unskilled personnel.

Redistribution of persons in the labor force involved the transfer of millions of workers from non-essential to essential activities, as, for example, from work in a cosmetic plant to work in an aircraft plant. Much of this transfer was automatic, induced by restrictions in many civilian industries and by the higher wages offered in most cases by war contractors. However, it was necessary to do comprehensive planning to get those who shifted jobs into the proper kind of work. Furthermore, the loss of seniority rights, the need of moving the family or living apart from them, the necessity of learning new tasks, and similar obstacles discouraged many transfers. Overcoming these reasons for reluctance to transfer also required much planning.

Although not strictly a manpower problem, the absorption of the unemployed was not without some bearing. During 1942, for example, the number of unemployed dropped from about four million to one and one-half million.<sup>8</sup> Most of the remainder were the less desirable workers who had been out of a job for a long time. They required much training to make them reasonably satisfactory and productive workers again. Transference of workers to more essential jobs also intensified the training job. In the early stages of the war, in particular, the training function had a heavy load put upon it.

Another problem faced the commission early in its operations. Serious shortages of manpower developed in some local areas at the same time that large numbers of unemployed remained in others. This arose out of the fact that not all areas of the country developed a tight labor market equally quickly, despite efforts to expand the labor force at the pace necessary to meet production and military requirements and despite efforts to direct the unemployed and new entrants to areas of labor demand. Throughout the first year shortages became progressively worse in many areas of intensive war production activity. In others surplus labor accumulated, and in still others available reserves were absorbed slowly. Within the areas, shortages that at first were confined to highly skilled occupations, such as tool and die making, widened by the end of the war to encompass a wide variety of less skilled and even semi-skilled occupations. In some areas shortages became so widespread as to include

<sup>8</sup> War Manpower Commission, *Manpower Statistics*, p. 1. Washington, D. C.: U. S. Government Printing Office, December, 1942.

all male labor regardless of the level of skill. By the time the commission was established in April of 1942 there already were acute shortages of male labor in a number of areas. The number steadily increased up to the end of 1943.

High wages, long hours of work, at overtime pay, plus the commission's efforts brought great influxes of workers into war production centers. Population shifts of this sort, while inevitable because of the geographic concentration of production, created serious situations that were not entirely problems of manpower but which affected labor turnover and other factors that indirectly affected manpower. The strain put on community facilities, such as housing, schools, transportation, and retail outlets, was so great that many families refused to go to or stay in the centers of war production. This situation emphasized the necessity of utilizing all labor reserves already within a locality: women, minority groups, handicapped workers, retired workers, and youths. Employed persons who did not want to give up their seniority rights on some regular civilian job could be used on a short shift of perhaps four hours.

The relative scarcity of workers in many areas suggested still another approach to the problem. That was to influence the allocation of contracts so that, where it was possible to do so, new ones would not be granted to plants located in the extremely tight labor-market areas.

Before the development of the stabilization program, and even to a considerable extent thereafter, labor pirating, that is, enticing away workers already employed, became a problem. As reserves of labor were depleted, many employers resorted to competitive bidding to attract workers. The wide age differentials among establishments, industries, and areas contributed much to the instability of the labor force; high rates of turnover were prevalent where workers were allowed freedom to move about from job to job.

Toward the end of 1942 the need for full utilization of manpower began to present more of a problem. Cost-plus contracts and employer concern over scarcities of labor encouraged labor hoarding in some plants, with a resultant wastage of manpower. Since this practice decreased the pool of labor available to war industry as a whole, it became necessary to urge and persuade employers to retain only those workers who could be effectively utilized, so that the *bona fide* manpower needs of all industries might be kept in a reasonable relationship to production requirements.

Within this framework the War Manpower Commission had to formulate policies for dealing with manpower problems and programs of action to carry the policies into effect. A manpower program had to be a statement of action or alternative actions to be

taken under varying conditions. The course of action that was pursued was determined in large part by purposes or objectives established as a result, not of the beliefs of manpower authorities, but of national policies made necessary by the war. Since the conduct of the war was so dynamic and there were so many eventualities for which we had to plan, a wide range of techniques and devices had to be developed, weighed, and held in readiness to meet emerging situations. Thus, military successes or reversals, executive orders, the letting of contracts, and wage and price controls all affected, and in good part determined, the manpower program, although the manpower program also affected these factors. Moreover, a variety of techniques and devices had to be evolved, since the national labor market is really a network of interrelated but extremely diverse local markets. Thus, the commission had to make the best possible assumptions as to future events and plan on that basis.

The programs and policies that the W.M.C. developed to meet these many problems rounded into a far-reaching program of controls. The commission tried to stick as nearly as possible to voluntary methods of handling controls, but it will be seen that it was not possible to do this in all cases.

Every wartime government organization of any size probably would have indicated a desire, if asked, to keep the functions of its Washington office and staff at the minimum consistent with coordinating the activities of the field staff and keeping them in line with national policy. In general, that was the purpose of the Washington office of the Manpower Commission. It set up a regional organization embracing twelve regions, each with its own director and Management-Labor War Manpower Committee. Since the Employment Service was organized on a federal-state basis prior to its absorption by the federal government, there was a nucleus of a state organization that also was used in some of the functioning of the commission. Finally, there were in many of the tighter labor-market areas, area directors and Area Management-Labor War Manpower Committees.

As has been said, one of the big jobs of the national office was the development of policy and the coordination of field activity. Although local labor-market problems had to be handled locally, there were other functions necessary to the development of a manpower program that were best handled at Washington. It was necessary to formulate broad general policies and programs for the consideration of and possible application by officials of the Manpower Commission's regional and area offices. In order to formulate such policies, it was necessary to secure information from field and area offices and from the United States Employment Service offices on the prob-

lems they were encountering and the methods that they used in dealing with various situations.

In the War Manpower Commission this function was performed by the staff of the organization. In order to make the work of the organization as realistic and as useful as possible to other government agencies, to employers, and to labor, questions and policies of national importance were developed through conferences and discussions with various government bureaus and the National Labor-Management Policy Committee, representing employers and employees throughout the nation. From the information and deliberation outlined above evolved national policy.

### The operations of the War Manpower Commission

We have indicated that because of the local nature of most manpower problems the War Manpower Commission, in dealing with the matters outlined in the preceding pages, in large degree decentralized responsibility to its field organizations, giving them power to adapt national policies to local needs. Regional directors were given broad authority for the execution of War Manpower Commission policies and activities in their regions. Area directors, responsible to the regional directors, were authorized to direct and coordinate the work of the commission in their localities. By April, 1943, twelve regional directors and over one hundred area directors had been appointed. Eventually, in all important labor-market areas joint management-labor committees were established by regional directors at both regional and area levels. Regional committees advised the appropriate directors on application and development of policies in their region, reviewed the recommendation of area committees and directors, and rendered assistance in situations that were beyond the scope of the area committees.

In addition, the primary operating arm of the commission, the United States Employment Service, operated through full-time offices in about 1700 communities and part-time branch offices in nearly 500 more. Those offices faced a wide variety of circumstances and operated with a considerable degree of decentralization.

An important prerequisite of effective manpower mobilization and utilization is the securing of adequate information. Early in its history the commission made rapid steps forward in laying plans to gather information. Measures were taken during the first year to ensure that workers would be classified accurately on the basis of grade and skill so that long-range employment forecasts could be made. To complement this information, data were sought on the numerical and occupational manpower requirements of new and

converted war plants as well as total requirements of all essential industry. These data made possible more adequate plans for recruitment and training.

In doing all this, the Employment Service, prior to its incorporation in the commission, began a series of studies of the occupational composition of various plants. These studies were carried on and expanded into plant and industry "manning tables," which indicated the normal percentage of workers of various categories in different plants. By use of such tools, an idea could be gained of whether an employer was hoarding or was unknowingly overstaffed with respect to some particular type of labor.

Another type of needed information was supplied by the designation of occupational "families." These listed various jobs in different industries that were similar in their required skills and abilities. Use of such data facilitated the transfer of workers from non-essential to essential industries and was likely to make such transfers more productive and satisfactory.

One of the early problems before the Manpower Commission was to decide how to distribute manpower when the supply was not large enough to meet all demands, a condition found in an increasingly large number of labor markets. It was clear that efforts should be concentrated toward supplying labor to essential employers when there was not enough to go around. The first problem, therefore, was to determine which industries were essential and which were not. In some instances there was no problem; the building of such items as tanks, airplanes, and ordnance materials was clearly essential. But many cases were not so clear-cut. What of a laundry for instance? Without laundry service some women who might otherwise work in war plants would not do so, or, if they did, would be absent frequently, thus disrupting production around the spot where they worked. Acceptable cafeteria or restaurant facilities are another example of the same general sort.

Therefore, the first step, generally, in determining priority of referrals of available manpower was a series of decisions on the relative importance of war activities and war-supporting activities. Once such decisions were made, the next problem was to determine the necessary volume of work to be done.

Experience under this system of priority services demonstrated the need of servicing the whole labor market. Access to the total labor supply was hampered by restriction of any part of the employment service's field of operation. Hence, on March 26, 1943, service priority was given also to "locally needed" activities.<sup>9</sup> This al-

<sup>9</sup> United States Employment Service Operation Bulletin No. B-29 was superseded by Operation Bulletin No. B-66, March 28, 1943.

teration in policy recognized the desirability of rendering complete service to employers engaged in both essential and less essential activities, and directed the local offices to provide as much service as staff time would permit to less essential employers.

In addition to the general needs for manpower recruitment for industry, the requirements of some industries were met by specialized offices servicing them alone, such as the Central Aircraft office in Los Angeles and a central office for the referral of shipyard workers at Wilmington, California. Special offices to accelerate the recruitment of women were also established in Baltimore, Buffalo, and Cleveland.

The existence of varying degrees of tightness in labor-market areas has already been noted. Appreciation of this led the commission to begin classifying areas as to their relative tightness and in the fall of 1942 to make recommendations to the War Production Board as to whether or not contracts should be awarded or renewed in certain regions. Areas were classed from Group I, the tightest, to Group IV, the least tight. Although in many cases the concentration of industrial facilities made it impossible to throw contracts into the easier labor-market areas, the work did have good results; after the plan went into effect there were fewer contracts placed in the extremely tight areas, but the success of the plan was indeed limited.

#### **The utilization of manpower reserves**

One of the big jobs of the commission was that of encouraging reserve groups to come into the labor force and of persuading employers to use them. This was not always accomplished easily; the woman who had spent many years as a housewife found it difficult to bring herself to attempt to continue that job and work in a war plant as well. And many an employer, faced with the necessity of changing jobs and equipment so that women could do the work, was reluctant to try it. Similarly with handicapped workers; the idea of hiring those who came into the plant with a cane or on crutches was novel.

As the labor market became tighter and more and more people were withdrawn to go into the armed forces, the doubts of employers faded. However, even though they became amenable, it still was not always possible to hire women or other reserve groups. The problem of the commission began to be predominantly one of recruiting an adequate number of women to meet the growing demand. To promote the orderly entrance of women into the labor market, the W.M.C., on October 17, 1942, issued a general policy statement on the recruitment, training, and employment of women



workers. The stated principles were as follows: (1) qualified women who were employed and registered in local offices of the United States Employment Service were to be referred to employment and training on a basis of equality with men, whenever physical requirements and other conditions permitted. (2) women without children under fourteen years of age were to be actively recruited for employment and training, while women with young children but desiring employment were also to be considered (active efforts to recruit from the latter group were to be postponed, however, until other resources of workers had been exhausted); (3) reserves of female labor were to be fully tapped before "in-migration" from other areas was sought.

Women's recruitment centers, the use of itinerant local office interviewers, intensive education and information campaigns (using press, radio, and community groups), house-to-house canvassing, and other measures all were tried as methods of recruiting under the principles outlined. The campaign succeeded in that many women were added to the labor force; the number entering the labor market between March, 1942, and March, 1943, for the first time was nearly 2,000,000, with over ninety per cent going into non-agricultural occupations. The success of this recruitment depended in large part on the severity of local labor shortages.

Negroes constituted another large reserve of labor for which concerted efforts were expended to bring about adequate utilization. During peacetime, when there was plenty of labor available, it was not uncommon to find discrimination by unions, employers, or unorganized groups of workers. This, plus long-standing tradition, meant that in many places of employment Negroes were hired for the hot, heavy, dirty, and unskilled jobs. The same prejudice and traditions carried over into the war period, and it was not unusual for an employer to cry that his production was being held up because of a lack of manpower while failing to utilize fully every available type of labor in all types of jobs.<sup>10</sup>

Recognizing these facts, the President, in June, 1941, established a Committee on Fair Employment Practice.<sup>11</sup> Its function was by persuasive means and not by force to encourage the full participation of all groups in the defense—and later war—effort. It had the power to investigate complaints and urge compliance, but could go no further. The committee was transferred to the War Manpower Commission with the proviso that it be retained as an organizational entity. Later it was reorganized as an independent agency,<sup>12</sup> but its functions remained essentially the same.

<sup>10</sup> For examples see: *Manpower Review*, December, 1943, Vol. 10, No. 12, p. 5.

<sup>11</sup> Executive Order 8802, dated June 25, 1941.

<sup>12</sup> Executive Order 9346, dated May 23, 1943.

Partially as a result of the F.E.P.C. and partially owing to the continuous tightening of the labor market in many areas, the practice of discrimination against non-whites declined. Probably the practice of the Employment Service of refusing to serve employers who were known to discriminate had a beneficial effect in cutting down the extent of the practice. However, the results of the committee action were not long-lived. With Congress unwilling to enact a fair employment practice law or to appropriate money for the wartime expedient, it ceased to function. Certainly the committee helped to cut down discrimination during its lifetime; probably it left some residue of added tolerance with many people. However, in the postwar period there still are many instances of racial discrimination.<sup>13</sup>

The training function of the commission was one that offered, to those interested, courses ranging from pre-job training for a completely inexperienced person to a part-time, on-the-job course to improve the work of foremen and supervisors.<sup>14</sup> Some of the programs were out-of-plant training for totally inexperienced persons such as children, women, or white collar workers preparing to take a war job. As the labor markets got tighter, it became more difficult to recruit trainees for unpaid pre-employment training. By early 1943 the number taking such courses was dropping sharply, and many of those enrolled were participating on a part-time basis while keeping their regular job. This did not reflect a drop in over-all training work being done, but only a shift of the job into the plants where the trainee was paid while learning. The courses were adapted as much as possible to the needs of the employees, but except for training aids within the plants they were well past their peak by mid-1943.

A final big job of the commission was that of encouraging the efficient use of manpower. In the early stages of the war there was much talk, and with reason, about hoarding and underutilization of labor. As long as such practices existed, it hardly made sense for the commission to urge that women leave their homes to take up industrial jobs, that certain community services be curtailed, or that foreign labor be imported. Although there had been work done on utilization earlier in the history of the commission, it was not until 1943 that a Bureau of Manpower Utilization was set up. In addi-

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<sup>13</sup> There were many other groups of "labor reserves" that the commission worked hard to "sell" to employers. However, their number and relative unimportance in the national picture preclude their discussion here. For a consideration of these various reserve groups see: *Manpower Review*, June, 1943, Vol. 10, No. 6, *passim*.

<sup>14</sup> Six agencies functioned in the training program: Vocational Training for War Workers; National Youth Administration; Engineering, Science, Management War Training; Rural War Production Training; Apprentice Training Service; and Training-Within-Industry.

tion to making the activities listed above, such as asking housewives to go into the war-plants, more reasonable, more effective use of manpower lessened the need for additional workers and cut some of the need for such extreme measures.

The work of this bureau was almost entirely a non-compulsory type of service rendered to employers. A relatively small corps of industrial consultants was employed whose members were available to make surveys of manpower utilization practices in various plants and advise on methods of improvement. Most of this work was carried on in the field by employees from the regional offices, although a few specialists were sent out from the national office when the situation so dictated.<sup>15</sup> The Bureau of Manpower Utilization had a function to perform that was potentially as important as any in the commission. However, the tardy organization of the bureau and the heavy reliance on entirely voluntary methods kept it from fulfilling its task as well as might have been hoped.

Despite all efforts to meet manpower needs, it was almost impossible to keep adequate numbers of workers in some types of low-paid, hard work. Some help in filling quotas for maintenance-of-way work on the railroads and for agriculture was given by the importation of workers from Mexico and some of the Caribbean islands. Such workers had to be brought in under special agreements and rules and for limited periods of time. Between May and August, 1943, more than 15,000 Mexicans entered this country, largely for work in the Southwest.<sup>16</sup>

The foregoing section has sketched the parts of the program of the War Manpower Commission that relied on voluntary compliance. Probably no other government wartime program that went so deeply into everyday life made so much of a fetish of talking or cajoling people into doing what was wanted of them. Urging a housewife to accept a factory job or a store clerk to drop his seniority and take a job that obviously was temporary in an aircraft plant reached rather deeply into habits and customs that were not quickly changed; in some cases more than a habit was involved. A vested interest in a job, based on length of service, is an important right, to older workers in particular.

#### The development of quasi-compulsory methods

The commission gradually found that in areas where labor markets were particularly tight it took more than voluntarism to do a good

<sup>15</sup> For a summary of various aspects of the utilization program see: *Manpower Review*, October, 1943, Vol. 10, No. 10, articles by Frank H. Sparks, Eugene G. Bewkes, Carroll L. Shartle, Rhea Radin, John J. Skelly, and others.

<sup>16</sup> "Mexico Helps War Effort of Our Railroads." *Manpower Review*, December, 1943, Vol. 10, No. 12, p. 10.

job of manpower mobilization and utilization. Throughout all its existence the national office maintained an official position of favoring those methods that were acceptable to the people. But in local areas and on the entire west coast, where extreme shortages of labor made the manpower situation especially acute, there were moves away from voluntary methods. An examination of a few of these plans will show the type of controls that were imposed when the going became too rough to depend on voluntary cooperation.

Although not so inclusive in the manpower utilization practices covered, the establishment of the minimum wartime work week was a good example of sweeping, mandatory regulation of manpower policies. In February, 1943, the President directed<sup>47</sup> that all plants and facilities must, if they were to be deemed as making full use of their labor force, schedule a work week of at least forty-eight hours. The War Manpower Commission was given the job of determining all questions of interpretation and application of the order. The chairman was allowed to prescribe a longer or shorter work week if he decided that such an exception would allow the business to contribute more effectively to the war effort.

Shortly after the appearance of the executive order the chairman issued the first general regulation concerning the interpretation and application of it. In the regulation it was provided that the minimum week of forty-eight hours would be applied to labor-market areas and to activities (industries or parts of industries). In the beginning, the chairman listed certain areas or industries to which the minimum week was applicable; thereafter, he or the regional directors could extend the required work week to other areas or industries. Unless and until an area or industry was designated as subject to the order, the employers therein were not required to lengthen their work week.

The minimum wartime work week was defined as a scheduled work week of forty-eight hours except where such (1) would have been impractical owing to the nature of operations, (2) would not have contributed to the reduction of labor requirements, or (3) would have conflicted with any federal, state, or local law limiting hours of work. In such cases, the minimum week was the greatest number of hours less than forty-eight that was feasible in the light of the operations, reduction of labor requirements, or law that made the longer week impracticable.

The extension of the work week to new areas or activities was somewhat touchy in the sense that a longer week might in some cases cause the release of workers to the ranks of the unemployed. In view of this fact, it was directed that a study of the effects of the

<sup>47</sup> Executive Order 9301, dated February 9, 1943.

longer week be made prior to its application. If it appeared that no workers would be released, the application was to go into effect at once. If it appeared that there would be workers released who could be placed promptly in suitable work, then the longer work week also should be put into effect at once. If the survey indicated the probable release of workers who could not be placed at once in suitable work, a schedule of gradual extension of the work week was to be drawn up by the employer; on approval by an authorized representative of the commission, the week would be extended to schedule, while the Employment Service sought to place the persons released.

The enforcement of the executive order and the regulations issued under it was centered in one provision. No employer could "hire any worker in an area or activity designated as subject to the provisions of Executive Order No. 9301, if the employer . . . failed in any manner to comply with the provisions of . . . these Regulations in the plant, factory or other place of employment in which the worker would be employed." An employer was not deemed to be utilizing his workers efficiently if they were scheduled for less than forty-eight hours of work per week; and if he was not using his labor force efficiently he had no right to hire more workers. If he needed more labor he should get it by extending the hours of work of his present employees. The regulation was specific on the point; he was not to hire more workers until he put his own organization in order.

Of course, it was not possible to apply such an order to every employer. The following were exempted: (1) places in which fewer than eight persons were regularly employed; (2) any place of employment principally engaged in agriculture; (3) states and their political subdivisions; (4) youths under the age of sixteen; and (5) individuals who because of other employment, study or training, household duties, or physical limitations were not available for full-time work.

The regulation was applied in critically tight labor-market areas all over the country. It was applied to the basic steel industry in the face of strong protests by steel men. It was estimated that in that one industry alone the order resulted in the release of 50,000 workers for other war production work.

A more sweeping and inclusive compulsory manpower program was developed on the west coast in the summer of 1943. That general region, especially the areas around San Diego, Los Angeles, San Francisco, Seattle, and Portland, had an extremely heavy concentration of aircraft and shipbuilding; the shortage of labor was critical and it seemed impossible to fulfill all the war production quotas set for the west coast. Not only was the shortage of labor pronounced.

but there were extremely high turnover rates and excessive labor hoarding and underutilization, all of which intensified the seriousness of the situation. In the summer of 1943 it was estimated that a minimum of 200,000 more war workers would be needed by the end of the year.<sup>18</sup> It was impossible to bring that many more persons into the area; housing and transportation facilities, schools, hospitals, and other community services could not stand the strain. Much of the labor had to be found right at home.

Since voluntary methods had not succeeded in solving the manpower problem in the area, steps were taken to lay down compulsory rules and regulations. The War Production Board and the War Manpower Commission collaborated in developing the West Coast Program, since the problem of production was so closely tied into the picture. The plan developed was based on two assumptions: that manpower could be made available locally and that the volume of production could be maintained on the west coast.

The key organizations in the program were Area Production Urgency Committees and Area Manpower Priorities Committees set up in each of the five critically tight urban areas mentioned above. The composition of each is not important, but they were made up primarily of officials of important war agencies of the federal government located in that area.

The first job to be done was to rate the relative urgency of production of various goods in the local area. For example, was aircraft, ship repair, shipbuilding, or some other activity the most urgently needed production? Once these ratings were made it was necessary for the Manpower Priorities Committees to translate them into labor requirements. These requirements and the priorities allocated had to take into consideration, aside from production urgency, the amount of production lag if any, utilization of labor, hoarding of labor, personnel policies, and so forth.

With the knowledge available, it was possible for the Manpower Priorities Committees to set employment ceilings stating the largest number of workers that a certain employer was allowed. The ceiling might put an employer in any one of three classes: I, in which the present labor force was below ceiling and the employer might hire more persons (for these employers priorities of referral had to be set); II, in which the current labor force was at the ceiling and the employer was allowed to hire only replacements; and III, in which the labor force was over ceiling and from which plants the employment service could actively recruit workers to refer to other employers (workers employed in such plants could get statements of availability enabling them to move to jobs with higher priority).

<sup>18</sup> "West Coast Manpower Program." *Manpower Review*, November, 1943, Vol. 10, No. 11, p. 3.

All establishments permitted to hire workers were to hire only from those referred to them by the Employment Service, or other channels approved by the W.M.C., such as a trade union or the Civil Service Commission. No longer was the employer allowed to hunt around for his own labor supply and entice it with high wages if he could do so. In making referrals, the Employment Service was required to give attention to a worker's highest skill as well as to the urgency of the employer's need. The ideal situation was to refer a worker to the employer with the highest priority rating who had a job open that would use the worker's highest skill. If this could not be done, then the task was to balance worker skill in certain available jobs against the relative urgency of employers' manpower claims.

It was noted that the effectiveness of manpower utilization was considered as a factor in determining the relative priorities of different employers. In addition, manpower utilization surveys and programs were an integral part of such work. Surveys were begun on the request of management or on the motion of appropriate government agencies. The principal aims were to cut labor hoarding, underutilization, absenteeism, and turnover, and to improve personnel and production techniques.

Limitations were put on selective service withdrawals in plants with higher priorities. When all of the above measures failed to supply enough labor power, then the recruiting of women and others was sanctioned. The plan as outlined for the west coast was the most drastic manpower program coming from the war. It did not work in practice as well as it did on paper, but it did much to solve the manpower problems of the area. Of primary interest, however, is the degree of compulsion that was woven into the plan. Employers told the number of workers they could hire and workers limited in their choice of jobs was a new departure.

Programs similar to that of the west coast but much milder were introduced in many local labor-market areas as their situation became acute. These local programs were adaptations of standards and controls issued for the local areas by the Washington office. While there were wide variations, the plans were basically similar to the controls developed for the west coast and other pioneering local plans. They included restriction of movement of workers from one war job to another without a release from the first employer, restrictions on hiring by individual employers, plans for discouraging migration into the tight areas, and plans for improving the effectiveness of labor utilization.

In good part, the development of local programs instead of any sort of nation-wide program was due to the insistence of the National Management-Labor Policy Committee that whenever possible local

problems should be solved locally. These local plans ranged from informal discussions and agreements to formalized and rather tightly drawn programs. Their effects were varied, but it was clear that many of them were genuinely helpful. The fact that in many of the areas there was a reluctance to include stringent controls detracted from their effectiveness. Even during the war the value judgments of much of the public, management, and labor were such that they held on to individual freedoms at the expense of effective operation. Although there was some danger in relinquishing any right or liberty, even in wartime, too strict adherence to standards of value and behavior built up in peacetime was not in the interest of the most effective prosecution of the war.

### The value of the manpower program

By the end of 1943 the nation's manpower problems had reached their peak of acuteness and the programs followed by the commission were rather well defined and were not to change basically. One reason for the predominantly voluntary program followed by the commission was the attitude of the President, clearly seconded by Chairman McNutt, that there should be no legislation that enabled the government to order all persons in the nation into civilian jobs in which they were needed, that is, national service legislation.<sup>19</sup> The absence of any means of compulsion put the officials of the Manpower Commission in a rather difficult position. War Labor Board officials had executive orders and, later, legislation back of them in their resolving of wage questions. But except for the executive order on the minimum wartime work week, the manpower officials had no such backing. They were forced, therefore, to use those regulations and policies with which labor and the public would agree; and in a nation that encourages an economic individualism as much as does the United States, there is a rather sharp limit on acceptance of governmental restriction.

As a consequence, the manpower program was a sort of hodgepodge of activities varying sharply from one region or area to another. The policy of leaving much regional and local autonomy in meeting problems also contributed to the inconsistency. However, the variations in action did conceal a considerable similarity in general aims. In the later stages of the war almost all regions and areas were trying to keep "in-migration" at a minimum by procuring

<sup>19</sup> On January 11, 1944 the President in his message on the state of the Union endorsed national service legislation subject to prior establishment of four other measures. These were: (1) a realistic tax law; (2) a continuation of the law for renegotiation of contracts; (3) a law regulating food costs adequately; and (4) early reenactment of the Stabilization Act of 1942 that was to expire in June. Nothing came of the endorsement, with its careful limitations.



the manpower needed by essential activities at home. This meant emphasizing the use of labor-reserve groups, cutting absenteeism and turnover rates, stopping labor hoarding, encouraging any modification of jobs that would make it possible for available labor to do the job, and encouraging forty-eight hours of work per week and more efficient utilization of the labor force. Almost any manpower official would have given some such list of aims if he were asked what his program included. Therefore, the varying actions of different areas, although in part a reflection of lack of understanding or initiative on the part of some persons, were also in many instances an indication of different points of view and approaches to the manpower problem of the area or region rather than different basic aims.

Shortly after the close of the war the commission was terminated,<sup>20</sup> but not all of its functions ceased at once. The organizations that had been in existence before the war were transferred to other government agencies that were permanent parts of the federal organization, mostly to the Department of Labor. However, much of the wartime work in developing area and industry programs, in encouraging manpower utilization, and in administering the minimum wartime work week was discontinued. One difference between the two postwar periods, however, was that after the second war the potential core of any future manpower mobilization program, the United States Employment Service, was kept alive and given operating funds. Although the local offices were returned for operation to the states in November, 1946 (the wisdom of which was debatable), they are still functioning. In view of their recognized value both as placement agencies and as a necessary adjunct of an unemployment compensation program, there seems little likelihood that there will be a repetition of the unwise cut in funds that put the service in a state of suspended animation for nearly fifteen years after the first World War.

From the above discussion it is clear that the Manpower Commission is important primarily as an example of non-legislative government controls. As has been noted at other points in this study, an increasing amount of government control is coming in that manner. Sweeping changes in the labor force and its composition and in ways of living and earning a living were induced without legislative force, except for the drafting of men for service in the armed forces. The program was reasonably effective and much genuinely beneficial work was done. It has been suggested that in some cases more coercive power would have allowed more effective work. However, in view of the unwillingness of the President and Congress to enact

<sup>20</sup> Executive Order 9617, dated September 19, 1945.

national service legislation, which would have allowed control over civilian manpower as well as military, the manpower job that was done with the tools available was commendable.

### Questions

1. Was there any direct conflict between hours provisions of the Fair Labor Standards Act and the wartime manpower program? Explain.
2. Were the manpower policies followed during the war too lenient? Should there have been a more forceful program of directing persons into important jobs and keeping them there?
3. To what extent was the manpower problem a series of local problems that needed to be handled at the local level? Why?
4. The inefficient use of manpower was one of the knotty problems faced by the Manpower Commission. Do you think efficient utilization of manpower was a problem that could be handled by government action? Why or why not?
5. Was it wise for the Manpower Commission and the War Labor Board to be separate from the Department of Labor? Why or why not?
6. Evaluate national service legislation, which would give the government power to direct the activities of civilians in a manner similar to that used with the armed forces, as a means of handling manpower problems effectively.

## CHAPTER XXIV

### OTHER STATE AND LOCAL LABOR CONTROLS<sup>1</sup>

#### The place of state labor legislation

In earlier chapters frequent reference has been made to state, and infrequently to local, labor controls. It will be recalled that states, acting under their police powers, have been active in the regulation of child labor, hours of work, safety and health conditions, wages, and other matters. However, our emphasis, especially with regard to recent events, has been placed on federal legislation. This has been done in part because of the very great increase in the extent, coverage, and importance of federal legislation that has come in the years since the late 1920's. Another reason for the emphasis on federal action is the impossibility of treating comprehensively state laws that include such wide variations from one state to another. However, there are certain fields of state action, in addition to those already discussed, that are of sufficient importance to merit some attention. There are also some actions of local governments that have enough influence to warrant brief discussion.

Under their police power—the power to legislate for the general welfare of the public—states can enact almost any regulation that they see fit, as long as the control does not override constitutionally protected rights and if the reasonableness required by the due process clause of the fourteenth amendment is not violated. In this connection, it should be repeated that the people have no rights, not even that of life itself, that cannot be taken if the legal proceedings by which the right is taken are reasonable. The fact remains, however, that although the states have the widest latitude for regulation, concepts of what is and is not in the public interest vary widely. Therefore, the most characteristic trait of state labor regulation is the extreme variation between one state and another.

For example, it has been noted that every state has some form of child labor regulation and all have enacted workmen's compensation laws; but the differences in the laws are extreme. In many

<sup>1</sup> Not all of the materials dealt with in this chapter arose out of the war or postwar period. However, since the major subject dealt with in the chapter is state labor relations laws and in these much of the development after 1939 served as a guide for postwar federal action, labor relations and other state controls are included at this point.

other fields there is not even so much nominal similarity in action. Perhaps half of the forty-eight states have some laws significantly affecting labor relations, fewer than half have anti-injunction statutes, and only seven have statutes of fair employment practice. So the story goes; there are all types of good, bad, and indifferent action plus many instances of complete inaction.

There are many cases in which both state and federal governments enact regulations in the same field, such as wages or hours, for example. In such instances, the federal regulation prevails in occupations that are a part of or affect interstate commerce.<sup>2</sup> State laws prevail in industries that are clearly intrastate, such as restaurants, laundries, retailing, and the like. However, as has been noted, where the state law is the more demanding, it can be applied even in those areas subject to federal control, since enforcement of the state law would not lessen the effectiveness of the federal law. Presumably, state controls could not be enforced, however, if it could be proven that the enforcement had a harmful effect on interstate commerce.

From the point of view of what is best for the entire economy, perhaps the greatest weakness in state control of labor problems is the wide variations just noted. There are a number of reasons for this. One is that the great diversity in legislative requirements may give the businessmen in one state a competitive advantage over those in another. This situation always serves to discourage states from going ahead as leaders in the enactment of laws that may put a financial burden on their employers who compete with other businessmen from outside the state not subject to equally exacting laws. Of course, lower legislative requirements will not always be sufficient to overcome other disadvantages, such as greater transportation costs or a less efficient labor supply, but if other factors are relatively equal, the competitive advantage may be marked.

Another disadvantage of state regulation is that the more exacting laws may be circumvented by the location or relocation of industry. If one state has legislation concerning wages or the employment of women that is inconvenient or expensive to employers, relatively mobile industry, such as a clothing or shoe factory, may be moved. If this is not done, new plants, at least, will avoid states with such laws if other conditions influencing location are equal. The effect on the migration or selective location of an industry will depend on its cost structure and the savings that seem probable.

Despite objections to and weaknesses in state labor legislation, there is and will continue to be many state enactments controlling or

<sup>2</sup> This would not be true where, as in the union security provisions of the Taft-Hartley Law, the federal Congress specifically gives precedence to state legislation.

affecting labor. Aside from wages, hours, workmen's compensation, and other regulations previously noted, there are a number of other areas of state control that are important enough to merit attention. These include: measures to lessen the number of disputes and to aid in the settlement of disputes that do arise; laws controlling discriminatory employment practices, laws restricting the activities of unions, and others. In addition, some local ordinances in roughly the same fields are of importance. Let us examine some of these laws.

### State labor relations laws

State labor relations acts have not been passed in as many states as have other types of control. However, the ten such laws enacted by the beginning of 1947 were important for a number of reasons. First of all, they were important for the influence they have had on labor relations within the state boundaries. The state laws also are worth noting in some detail for their influence on federal action. All of the ten state laws were passed after the National Labor Relations Act, but a number of them enacted a few years after that law took an entirely different approach to labor relations. Since the states are to a considerable extent smaller areas of jurisdiction in which legislative experiments can be tried out, it is probable that the state laws influenced the provisions written into the Taft-Hartley management-labor relations act.

The ten states having labor relations acts in January, 1947, and the year of their passages are: Colorado (1943), Connecticut (1945), Massachusetts (1938), Michigan (1939), Minnesota (1939), New York (1937), Pennsylvania (1937), Rhode Island (1941), Utah (1937), and Wisconsin (1939).<sup>3</sup> Generally, these laws have followed in good part the National Labor Relations Act, but several of them have gone rather far into the field of mediation and arbitration of disputes.<sup>4</sup> Where stated, the public policy underlying the acts has been that public interest and well-being demand that certain regulations of labor relations be enacted.<sup>5</sup>

Essentially, the provisions of the laws center around three general subjects: (1) unfair labor practices of employers, (2) election and certification of employee representatives, and (in about half the laws) (3) unfair practices of workers. The unfair labor practices of employers cited in most of the laws cover the practices proscribed

<sup>3</sup> Prentice-Hall's *Complete Labor Equipment*, Vol. 3, *State Labor Laws*.

<sup>4</sup> Colorado, Michigan, Minnesota, and Wisconsin.

<sup>5</sup> Yoder, Dale, "State Experiments in Labor Relations Legislation." *Annals of the American Academy of Political and Social Science*, November, 1946, Vol. 248, p. 130.

in the original National Labor Relations Act. In addition, a number of laws list spying on employees, the deduction of dues without written notice, refusal to discuss grievances, and a few other more unusual items as unfair practices.<sup>6</sup>

The unfair labor practices of employees include the following, although the list is not complete: (1) coercion or intimidation of other employees, (2) violation of union agreement, (3) striking, picketing, or boycotting unless the action is authorized by a majority of employees, (4) sit-down strikes, and (5) coercion or intimidation of employer.<sup>7</sup> Various other provisions will be noted as some of the individual laws are described.

The Connecticut State Labor Relations Act of 1945 may be noted as one example of state action. Owing to its late enactment, it had the benefit of the experience of other states from which to profit. It does not follow the example of a number of the later state laws in spelling out unfair labor practices for employees. There is, however, a rather comprehensive list of unfair practices for employers. These include: (1) spying upon employees to learn about their collective bargaining activities, (2) preparing or keeping a blacklist of union members or sympathizers, (3) dominating or interfering with the formation of a union, (4) requiring union membership or lack of it as a condition of employment, (5) discriminating with regard to hire or tenure in favor of a company union or in opposition to an independent one, (6) refusing to bargain collectively with *bona fide* union representatives, (7) refusing to discuss grievances with representatives of employees, (8) discharging or discriminating for giving testimony under the act, and (9) interfering in any other way with the freedom of workers to organize in independent unions.

Provision is also made for the labor relations board established by the act to determine appropriate bargaining units and representatives in these units. In case of alleged unfair labor practices, the board holds hearings and otherwise acts in much the same manner as the national board did, except that no attorney for the state board makes any attempt to demonstrate the merits or demerits of the complaint. Of course an appeal may be made to the courts of any board order.

While the Connecticut act was one of the most recent of the general labor relations acts passed by a state,<sup>8</sup> the New York act was one of the earliest, and it will be noted for purposes of comparison.

<sup>6</sup> Prentice-Hall's *Complete Labor Equipment*, Vol. 3, *State Labor Laws*.

<sup>7</sup> *Ibid.*

<sup>8</sup> Many states have put some legislative block in the way of the closed shop or other specific practice. However, these are not classed as general labor relations acts because they attack only one type of problem.

It was enacted in 1937<sup>9</sup> for the purpose of enabling employees "to possess full freedom of association, actual liberty of contract, and bargaining power equal to that of their employers." This policy was espoused because the New York legislature held that the denial of full freedom to organize tended to depress wages and that this in turn resulted in: (1) recurrent and aggravated business depression, (2) greater disparities between production and consumption, (3) unemployment, and (4) increased relief expenditures. Therefore, this law, as was true of the federal act, was as much an attack on economic problems as it was an attempt to ensure respect for an individual and the collective right of working groups to form unions if they wished to do so.

The unfair labor practices are similar to those listed by the Connecticut act; they include: (1) spying on employees, (2) preparing or keeping an anti-union blacklist, (3) dominating or interfering with the formation or functioning of a *bona fide* union, (4) requiring as a condition of employment membership in a company union or non-membership in a non-dominated one, (5) discrimination in terms of hire or tenure on the basis of union membership or non-membership, (6) refusal to bargain collectively with union representatives, (8) discrimination or discharge because an employee has given testimony or other information concerning violation of the act, and (9) doing any other act that interferes with the right to organize. As in the Connecticut and other acts, the state labor relations board has the job of determining appropriate bargaining units and ascertaining the identity of employee representatives in those bargaining units. Appeals to the courts are allowed from any order or other action of the board in an unfair labor practice case.

Like the Connecticut law, the New York law was written to extend to intrastate workers roughly the same guarantees as were contained in the national law. The body of doctrine and experience that has evolved, especially from the New York law with its longer life, shows that the two were relatively liberally administered and were of benefit to union groups. The philosophy and application of some of the state laws cannot be thus described; the Minnesota State Labor Relations Act of 1939<sup>10</sup> is an example. An examination of the important provisions of the act will emphasize this point of view.

The Minnesota law is one which mixes preventive and curative labor legislation; that is, the law seeks through the stipulation of certain rights and duties of both employers and employees to prevent misunderstandings and disputes from occurring. If, despite the

<sup>9</sup> 1937 Laws, Chap. 443.

<sup>10</sup> Acts of 1939, Chap. 440; Amended Laws of 1943, Chap. 624.

various measures, strikes or lockouts do occur, the law makes provision for conciliation that may serve to close the dispute. Before noting the dispute-settlement methods, the rights and duties of both employers and employees are of interest.

The act prefaces the statement of unfair labor practices with a section guaranteeing the right of both employers and employees to uncoerced association with any organization of their choice for purposes of collective bargaining. Following is an extended list of unfair labor practices for employees or labor unions. These include: (1) striking in violation of an agreement, (2) striking without giving certain notice or observing a "cooling-off" period in certain instances, (3) seizure or occupation of property during a labor dispute, (4) picketing with less than a majority of the pickets on duty being employees of the picketed establishment, (5) picketing by more than one person per entrance when no strike is in progress, (6) interfering with the operator of a vehicle when neither owner nor operator of the vehicle is a party to the strike, (7) coercing a person into joining any labor organization or strike against his will, (8) striking without approval voted by a majority of the voting employees in the struck bargaining units, and (9) engaging in a secondary boycott against a processor of agricultural produce. All of these unfair practices except the first are declared to be unlawful acts. It is also unlawful to interfere with the free use of public roads, streets, and highways, or wrongfully to obstruct "ingress to or egress from any place of business or employment."

A list of unfair labor practices for employers is also given; they are forbidden to: (1) institute a lockout in violation of an agreement, (2) institute a lockout before giving notice of a required length or before the end of a "cooling-off" period prescribed in certain instances, (3) discriminate in hire or tenure in order to discourage union membership, (4) discriminate against or lock out an employee for giving testimony under the act, (5) spy on employees exercising their right to free and uncontrolled organization, and (6) prepare or circulate a blacklist directed against members of or sympathizers with unions. Practices two, four, five, and six are declared to be unlawful acts; just why a lockout in violation of an agreement or discrimination against union members are less undesirable than the other unfair practices is not readily discernible.

An injunction by state courts to prevent or stop the commission of unfair labor practices is allowed, although infrequently used, if the writ is based on testimony in open court and is returnable in seven days. However, the court has sixty days in which to decide on an application for a temporary injunction before the temporary restraining order is automatically dissolved. Such a period of time



allowed for a restraining order is more than seems warranted. It is utterly impossible to maintain the *status quo* in a labor dispute for two months.

The law carries a rather extensive section on the jurisdictional dispute and how it is to be handled. Where such a dispute exists and is used as the basis of picketing or a strike against an employer, that fact is to be certified to the Governor by the chief labor conciliator of the state agency. The Governor may at his discretion appoint a referee to hear and decide the dispute. If both unions are members of the same federation, the referee is to decide the issue on the basis of any agreement as to jurisdiction that the two unions may have signed, or the charters which they have been granted, or on the past history of the organization. Prior to the naming of a referee the disputants may submit the issue to arbitration by some labor tribunal named by the parent federation or perhaps chosen by the parties. Once a referee is named or a tribunal established, it is unlawful to strike, picket, or boycott because of the dispute.

As previously noted, the act includes a number of provisions for settling disputes that have broken out instead of laying emphasis on measures that might prevent their development. An indication of the general philosophy back of the Minnesota act is given by the fact that it is administered by a labor conciliator. Unless disputes occur there is no need for a conciliator; while it would be foolish to assume that any law could be so drawn as to prevent all disputes, the title of the administrator implies a different philosophy as to the proper functions of the state labor relations act than is shown in laws such as that of New York.

The dispute-settling provisions of the act are of interest. First of all, if it is desired to negotiate a new agreement or modify an existing one, a notice in writing must be given to the other party. If no agreement is reached within ten days of the serving of notice, then a notice of intent to institute a strike or lockout can be given. However, no lawful strike or lockout can begin for ten days after the second notice is filed. Meanwhile, the state labor conciliator may take jurisdiction over a dispute if requested by either party to do so.

If a dispute in any industry affecting public interest is not settled by the above means, there is another possible action.<sup>11</sup> The labor conciliator notifies the Governor of the situation. Upon such notification, the Governor may but is not required to appoint a commission of three persons to investigate and report on the dispute and

<sup>11</sup> "Affected with a public interest" is not a clearly definable phrase. According to the law, this refers to (but is not restricted to) businesses supplying the necessities of life, safety, or health. This does not clarify much, since "necessities," "safety," and "health" may be variously interpreted.

the relative merits of the disputants' contentions. If the Governor decides to name a special commission, he must notify the conciliator of that fact; the conciliator in turn will notify the parties to the dispute. Once this last step has been taken, no strike or lockout or any change affecting the dispute may take place for thirty days. Meanwhile, the special commission, composed of a representative of workers, of employers, and of the public, must report to the Governor within the first twenty-five days of the same period. After the thirty-day "cooling-off" period has elapsed, unless it is extended by agreement of the principals they are free to strike or lock out as they see fit.

A final means of settlement outlined in the act is arbitration. Such action is to come only after written agreement of the two parties as to the terms and conditions under which it may take place. The labor conciliator may, if requested, act as a member of an arbitration tribunal or appoint members thereto. It is doubtful if a person can long retain a reputation as an impartial conciliator once he has served on a few arbitration panels in which he was forced to take a definite stand, usually favoring one party or the other.

At the risk of overemphasizing state labor relations acts, the general provisions of the Wisconsin act will be reviewed. This is done for two reasons. That state enacted in 1937 a statute similar to the New York law discussed earlier; two years later the law was replaced by a measure changing the emphasis sharply.<sup>12</sup> A second reason for the examination is that Wisconsin has been regarded for years as one of the more progressive states, in so far as labor and social legislation is concerned. The title of the Wisconsin act illustrates a difference in philosophy from a strict labor relations law: the Employment Peace Act. It is founded on the stated intentions of protecting the interests of employer, employee, and the public, and not allowing the rights of disputants "to intrude directly into the primary rights of third parties to earn a livelihood."

In an attempt to ensure these rights, the act lists the unfair labor practices of employers and employees. For employers these are: (1) to interfere with employees in the exercise of their right to organize, (2) to form or foster a company-dominated union, (3) to discriminate in hire or tenure so as to encourage or discourage union membership, (4) to refuse to bargain collectively with representatives of a majority of the employees, (5) to bargain collectively with a minority of the employees, (6) to violate the terms of a collective agreement, (7) to refuse to accept the ruling of a tribunal whose jurisdiction previously had been accepted, (8) to discharge an

<sup>12</sup> Laws, 1939, Chap. 57.

employee for giving testimony, (9) to check off union dues except on receipt of signed individual permits to do so, (10) to spy on employees exercising their right to organize, (11) to make or circulate a blacklist, and (12) to commit any crime or misdemeanor in connection with a labor dispute.

For employees there is another long list of unfair labor practices. These include: (1) to coerce an employee into joining a union, (2) to intimidate an employer or coerce him into interfering with employees exercising their right to organize, (3) to violate any terms of a collective bargaining agreement, (4) to refuse to accept the ruling of a tribunal whose jurisdiction previously had been accepted, (5) to boycott or picket without the approval of a majority voting by secret ballot, (6) to hinder or prevent lawful work by picketing, threats, and so forth, (7) to engage in a secondary boycott, (8) to take unauthorized possession of property as a part of a labor dispute, (9) to fail to give the required notice of intent to strike, and (10) to commit any crime or misdemeanor in connection with a labor dispute.

The act is administered by a three-man employment relations board to which any controversy concerning an unfair labor practice may be submitted. After a hearing before representatives of the board, a final ruling is made that is subject to court review. The board also has the task of naming, when necessary, appropriate bargaining units and the proper bargaining representatives for such units. In addition, it is empowered to name a mediator to act in any dispute; such a mediator can be named with or without the request of one of the parties to the dispute.

Under the law as modified in 1945,<sup>13</sup> an employer is allowed to sign an "all-union agreement" only if two-thirds of the *voting* employees in a unit approve by secret ballot the signing of such a contract. However, the two-thirds approval is not enough unless it also represents a majority of *all* employees in the bargaining unit. Thus, a closed or union shop agreement requires the approval of two-thirds of those voting in an election or a simple majority of all employees in the bargaining unit, whichever is greater.

We have now examined briefly four state labor relations laws. Nearly all requirements to be found in any of the states may also be found in one of these laws. There are a few exceptions. One is the requirement in the Colorado law that "each collective bargaining unit, local labor union, and company union" be incorporated. Another exception is the Colorado prohibition of a labor dispute to force an employer to join a union and quit working in his own business.

<sup>13</sup> Laws, 1943, Chap. 475; Laws, 1945, Chap. 424.

Perhaps the laws are important not so much for their coverage of employees as for their influence on subsequent federal legislation. Professor Yoder speaks of the states as "laboratories for experimentation in legislation and government."<sup>14</sup> Certainly the experimenting of Wisconsin and Minnesota can be seen clearly in the Taft-Hartley Labor Management Relations Act.

#### Other state laws affecting labor relations

Discussion of ten states with labor relations laws tends to leave an erroneous impression that only ten do anything to regulate labor-management relations. This is far from true; for example, the Bureau of Labor Statistics reported in mid-year 1947 that fourteen states had recently adopted legislative or constitutional provisions prohibiting the closed shop.<sup>15</sup> These states are Arizona, Arkansas, Delaware, Georgia, Iowa, Maine, Nebraska, New Hampshire, North Carolina, North Dakota, South Dakota, Tennessee, Texas, and Virginia. In addition, Alabama already had a law that amounted to the same thing. Most of the laws get at the closed shop through a provision that the right to work shall not be abridged because of membership or non-membership in a union and that a contract requiring either is unlawful. In a number of other instances, closed shops are controlled if not outlawed. Attention has already been called to the Wisconsin requirement of a two-thirds-and-majority vote in favor of it. In Kansas such a contract is allowed if approved by a majority vote, while in Colorado it takes the acclaim of three-fourths of those voting to justify the closed shop agreement.

A little further removed from labor-management relations but having some effect are the state laws that require union registration and financial reports from them. As of April, 1947, Alabama, Colorado, Delaware, Florida, Idaho, Kansas, Massachusetts, North Dakota, South Dakota, and Texas had such laws.<sup>16</sup> In each of these laws other than that of Massachusetts some regulation of the internal affairs or functioning of unions is included, matters of election and qualification of officers commonly being subjected to control. The regulatory provisions other than those relevant to registration and the filing of reports have not been well received in the courts. For example, the attempt of Texas to require all union organizers to apply for a license to the Texas Secretary of State before soliciting union members was held to violate the guarantee of freedom of

<sup>14</sup> Yoder, D., *op. cit.*, p. 130.

<sup>15</sup> "Legislative Restrictions on the Closed Shop." *Monthly Labor Review*, June, 1947, Vol. 64, No. 6, p. 1056.

<sup>16</sup> "State Laws Requiring Union Registration and Financial Reports," *Monthly Labor Review*, June, 1947, Vol. 64, No. 6, p. 1052. New Hampshire enacted a similar law in its 1947 legislative session.

speech made in the first amendment.<sup>17</sup> Similarly, the Florida attempt to require an annual license for union business agents and that such persons had to be citizens of good moral character who had lived in the United States for ten years was disallowed by the federal court. It was held to violate the National Labor Relations Act; also, the refusal to allow a union to function as such if it failed to file a report was held to conflict with that act.<sup>18</sup> In addition, state courts have invalidated some of the restrictions, such as that of South Dakota on the organization of agricultural workers and the Colorado requirement of incorporation.

There is at least one other field of state control that affects labor-management relations; that is the provision for aiding in the adjustment of labor disputes. Laws that put the state in the business of trying to settle labor disputes are relatively old; they began in Maryland in 1878 and spread rapidly. By 1900 twenty-five states had laws or constitutional provisions on the subject. Provisions for such action continued to spread, and by January, 1943, the number of political jurisdictions with similar plans had grown to thirty-nine states and two territories.<sup>19</sup> These laws vary widely in detail and in means specified for their application; some provisions on the books for years remain inoperative, as is the case with the Ohio law. Although few of the states provide for action by the Governor to aid in dispute settlement, it has not been uncommon for such action to be taken. Active endeavors by most states are a product of the years since 1935; the action is becoming more widespread but not too effective. Salaries paid and the caliber of persons used are in many cases not conducive to the highest efficiency.

#### Restrictive state controls in postwar years

Many state legislatures, in regular or special sessions, enthusiastically followed or extended in 1947 the unfriendly attitude already noted above. In that year all but seven of the states enacted some form of labor legislation. These acts ranged from the protective non-discrimination law of Connecticut to labor relations laws in some states that were almost as broad in their scope as the Taft-Hartley Law. Almost every type of labor control was enacted by one or more states, but the majority dealt with labor-management relations, union security, and secondary boycotts.<sup>20</sup> So in many in-

<sup>17</sup> *Thomas v. Collins*, 323 U. S. 516 (1944).

<sup>18</sup> *Hill v. Watson*, 325 U. S. 538 (1944).

<sup>19</sup> Kaltenborn, H. S., *op. cit.*, pp. 171-172; the nine states making no provision were Delaware, Florida, Mississippi, Missouri, New Mexico, North Dakota, Tennessee, Virginia, and West Virginia.

<sup>20</sup> For a summary of the content of these laws see: Prentice-Hall's *Complete Labor Equipment*, Vol. 3, *State Labor Laws*.

stances workers were subjected to federal and state restrictions in the same year. Let us note these controls briefly.

Union security clauses, especially closed shop clauses, came in for much attention by the states. Arizona and Arkansas laws specified no closed or union shop; Delaware, on the other hand, did not prohibit the closed shop, but stipulated that it was not an unfair labor practice to refuse a closed shop. Georgia forbade the closed or union shop, as did Iowa; similar action was taken by Nebraska and New Hampshire. Maine, on the other hand, prohibited only the closed shop. New Mexico's legislature enacted an amendment to its constitution, but a favorable vote was required to make it effective. North Carolina and North Dakota imposed legislative restrictions on the two types of union agreement; South Dakota, Tennessee, Texas, and Virginia did likewise.

Eleven states thus outlawed closed and union shops and another the closed shop; usually, the maintenance-of-membership clause was included in the prohibition. Another such outlawing awaited only a favorable vote on a constitutional amendment. In a few other cases, there were some restrictions put on the closed shop. Also, a number of the union security provisions prohibited or limited the checkoff of union dues. Iowa carried the limitation of check-offs furthest by allowing the deduction of dues only upon written consent of the employee *and* his or her spouse.

Strikes, picketing, and boycotts came in for considerable regulation. California, Delaware, Idaho, Iowa, Minnesota, Missouri, North Dakota, Oregon, Pennsylvania, Texas, and Utah forbade secondary boycotts. In a similar vein, mass picketing was frequently declared unlawful, and in a few states strikes in public utilities were prohibited. Some states also prohibited jurisdictional strikes or required majority authorization for strikes or picketing.

Other state laws were enacted, but restrictive legislation such as that outlined was the action most frequently taken. Enactment of protective labor legislation or the raising of standards, except for workmen's compensation, was indeed rare and atypical. The general anti-union sentiment so apparent in the first session of the 80th Congress was observable in many of the state capitols. There were exceptions, but the major portion of the restrictive legislation was passed in southern and midwestern states where agricultural interests still were large and powerful.

The tabular summary shown<sup>21</sup> on page 496 indicates the general nature of state controls on industrial relations that were enacted in 1947.

<sup>21</sup> Taken from *Monthly Labor Review*, September, 1947. Vol. 65, No. 3, p. 279, based on reports up to September 1, 1947.

## STATES ENACTING SPECIFIED TYPES OF INDUSTRIAL RELATIONS LAWS IN 1947

Prohibition of Closed-Shops or Other Types of Union Security Agreements	Restriction of Picketing and Other Strike Activity	Prohibition of Secondary Boycotts	Restriction on Jurisdictional Disputes	Regulation of Disputes in Public Utilities	Strikes by Public Employees	Registration and Financial Reports of Labor Unions
Arizona. <sup>3</sup> Arkansas. Delaware. Georgia. Iowa. Maine. <sup>1</sup> Nebraska. New Hampshire. <sup>2</sup> North Carolina. North Dakota. <sup>3</sup> South Dakota. Tennessee. Texas. Virginia.	Arizona. Connecticut. Delaware. Georgia. Idaho. Michigan. Missouri. North Dakota. <sup>3</sup> North Dakota. <sup>3</sup> Pennsylvania. South Dakota. Texas. Utah.	California. Delaware. Idaho. Iowa. Minnesota. Missouri. North Dakota. <sup>3</sup> Oregon. Pennsylvania. Texas. Utah.	California. Massachusetts. Michigan. Missouri. Pennsylvania. Wisconsin.	Florida. Indiana. Massachusetts. Michigan. Missouri. Nebraska. New Jersey. Pennsylvania. Texas. <sup>4</sup> Virginia. Wisconsin.	Michigan. Missouri. New York. Ohio. Pennsylvania. Texas.	Delaware. New Hampshire. North Dakota. <sup>3</sup>

<sup>1</sup> Permits the making or maintenance of "union shop" contracts.<sup>2</sup> Union security contracts are prohibited only with respect to employers having 5 or less employees.<sup>3</sup> Inoperative until voted upon by the people at the 1948 general election.<sup>4</sup> Relates only to picketing and sabotage.

Thus, a general sentiment of strong conservatism was combined with the traditional attitude of rural groups to produce widespread state support of the postwar labor policy of the federal government. The trend toward liberal social legislation and controls favorable to organized labor was halted at least temporarily. The duration of the halt and the extent of the reversed trend cannot be foretold.

#### State anti-injunction legislation

Another type of state labor legislation is that which controls the issuance of injunctions in labor disputes. Such laws are a very desirable adjunct to the federal anti-injunction act, since that act has no influence on the granting of injunctions by state courts. State legislatures must enact such laws if they wish their courts to observe certain practices in the granting or refusal of injunctive relief in labor disputes. Although a few states had enacted such controls prior to the federal law, the majority were enacted thereafter and were patterned on that law.

The first anti-injunction law enacted by a state was passed by Kansas in 1913; in the same year a revision of the Arizona statutes included a section limiting the issuance of labor injunctions. Other states followed suit slowly, and by 1932 at least ten states had such laws.<sup>22</sup> The Norris-LaGuardia Act set a standard to be followed, and some of the states that had acted previously revised their laws while others took the initial step. By early 1947 sixteen states had laws similar in stated purpose to the federal act; these were: Connecticut, Idaho, Indiana, Louisiana, Maine,<sup>23</sup> Maryland, Massachusetts, Minnesota, New Jersey, New York, North Dakota, Oregon, Pennsylvania, Utah, Washington, and Wisconsin.<sup>24</sup>

It should be kept in mind that the anti-injunction laws do not prohibit the issuance of injunctions under appropriate circumstances. Essentially, what they do is to specify good injunction practice and require that courts sitting in equity on damages allegedly arising from a labor dispute follow the prescribed practice. Since they center on injunctions in labor disputes, most of the laws define such a dispute as a controversy over terms or conditions of employment or the representation of employees in such matters, regardless of whether or not the disputants stand in the proximate relationship of employer and employee.

In such a dispute, injunctions usually may not be issued to pro-

<sup>22</sup> *Prentice-Hall Labor Course*.

<sup>23</sup> To be precisely accurate, the state of Maine should not be placed in this list, in that its law simply specifies briefly certain procedure that must be followed in the issuance of injunctions.

<sup>24</sup> *Prentice-Hall's Complete Labor Equipment*, Vol. 3, *State Labor Laws*.



hibit the following acts: (1) stopping or refusing to perform work; (2) joining or remaining a member of any labor union or employer organization; (3) paying to or withholding from a person engaged in a dispute strike benefits, unemployment compensation, or other things of value; (4) aiding any person interested in a labor dispute who is prosecuting a case or being prosecuted; (5) peacefully publicizing a labor dispute and the issues involved in it; (6) assembling peacefully to act in or organize for a dispute; (7) advising or notifying anyone of an intent to do any of the above acts; (8) agreeing to do or not to do any of the above acts; and (9) advising or inducing any of the above acts by lawful means. These prohibitions are usually found in state anti-injunction laws, but they are not found in every one and some laws add other prohibitions.<sup>25</sup>

Although state laws establish the prohibitions listed, they usually also provide specifically that injunctions may be issued in labor disputes if certain conditions exist. These conditions include: (1) unlawful acts have been threatened and will be committed or have occurred and are likely to continue unless restrained; (2) substantial and irreparable damage to property will result unless injunctive relief is granted; (3) greater injury will result to the complainant from failure to issue an injunction than will be caused the defendant if an injunction is granted; (4) there is no adequate remedy at law; and (5) officials cannot or will not furnish adequate protection.<sup>26</sup>

It is common but not universally true to find that injunctions may be issued only on the basis of a finding of fact filed by the court. Also, it is common to allow trial by jury for contempt unless the contemptuous act was committed in the presence of the court. It is usually specified that no union, officer, or member is responsible for the unlawful acts of other members or officers unless there is clear proof of actual participation or authorization.

It is not easy to determine the effectiveness of the state anti-injunction laws; no state has kept a record of injunctions issued before and since the enactment of their restrictive laws. Officials in the states having such laws do not commit themselves publicly as to their effectiveness; those who express any opinion show a mild and guarded optimism. Any comment usually is to the effect that the number of injunctions has declined because a greater effort for settlement is made prior to asking for an injunction. Whatever the effects of anti-injunction laws on the number of writs issued, if those issued appear only under the conditions outlined, the laws have done enough. There is no reason to hold that injunctions should never be granted in a labor dispute. It is only when they are

<sup>25</sup> Prentice-Hall's *Complete Labor Equipment*, Vol. 3, *State Labor Laws*.

<sup>26</sup> *Ibid.*

used without regard for proper injunctive procedure and clearly as anti-union weapons that they are indefensible.

### State regulation of discriminatory employment practices

State anti-discrimination laws also are worth examination, not so much because of the number of laws as because of what they stand for and for their potentialities. Essentially, the anti-discrimination laws seek to prevent employers, unions, or others from discriminating against a person because of race, creed, color, or national origin. It is somewhat surprising that such laws have to be enacted in a nation that is looked upon as the hope of the world for the preservation of democracy. True believers in democracy certainly would not need legislation forbidding discrimination. The fact is, however, that there is considerable discrimination by employers, unions, and workers based on race and religion. The Fair Employment Practices Committee (federal) established by executive order during the recent war was strongly opposed. Similarly, the efforts by some states to enact anti-discrimination statutes have been met by concerted opposition. Since discriminatory practices are quite common and so sharply in conflict with the essence of democratic society, the passage of laws to stop them is important.

Up to the present few states have enacted legislation against discrimination in employment: Connecticut, New York, New Jersey, and Massachusetts have effective laws. Indiana and Wisconsin also have laws, but theirs have no teeth for enforcement.<sup>27</sup> At its 1947 legislative session Oregon enacted a law expressing state policy as being opposed to discrimination. The provisions of the four effective acts are relatively simple. They do not apply to social, fraternal, religious, or other non-profit organizations. They also do not apply to employers hiring fewer than six persons. For all other employers they prohibit discrimination on the basis of race, creed, color, or national origin. This prohibition means no discrimination in hiring, discharge, or in compensation (except for a *bona fide* occupational qualification), and in advertisement for workers. Nor may an employer discharge or otherwise discriminate against a worker because he has filed a complaint under the law. A like prohibition is leveled against unions; a labor organization may not discriminate as to membership rights or in any other way if the discrimination is based on any of the factors just mentioned.

It should be noted that the laws do not prevent all discrimination. If, for example, an employer chose to discriminate against married men or persons with red hair, this could be done as long as no matter

<sup>27</sup> Prentice-Hall's *Complete Labor Equipment*, Vol. 3, *State Labor Laws*.

of race or religion were involved. The laws do not forestall the fixing of job qualifications so long as the qualifications are reasonable ones applied equally to all persons.

The laws are enforced by commissions named by the Governors of the states. These bodies may receive and act upon complaints of discrimination. In acting upon cases, they may hold hearings, subpoena witnesses, require the production of records, and so on. After a hearing, the commission may issue orders directing such action as will meet the requirements of the law. In order to institute an investigation, any person or his attorney may file a complaint, as may the attorney general of the state and the commission (in one state) or the state department of labor. As to penalties involved, the laws provide that persons who wilfully resist or interfere with the law can be fined up to \$500 or imprisoned up to one year or both. In addition, orders of the commissions may be enforced by injunction. Despite these provisions, enforcement action to date has been slight.

Altogether, the laws in existence to date only scratch the surface of the need. There seems little doubt that a federal fair employment practice law is some time away. For this reason, any action that is taken must come from state and local governments. As we have noted, the states have started, and we shall see a few localities are beginning similar experiments. Until the time that the federal Congress sees fit and finds a way to act in this field, a great extension in state regulation is needed.

Judging from the material presented in this and earlier chapters, the scope and nature of state labor controls must be considered as wide and varied. Under their police power, there is room for almost any reasonable control that is in the public interest and which does not interfere with interstate commerce or with the standards set by federal laws. Variations in state laws are wide and in many cases unreasonable, but this is not a criticism sufficient to warrant any thought of lessening the amount of state control. It must be improved and in many areas extended; the fact that in many cases state action points the way for subsequent federal controls makes the development of more socially minded state programs imperative.

#### Local government action in industrial relations

Some of the actions of local governments affect labor sufficiently to warrant consideration at this point. The difficulty is, however, that little is known about the labor policies and local ordinances that exist, and the task of collecting information from hundreds of localities is great. Attention has been called previously to the great

importance of local police action in labor disputes. Clearly, local police, or state militia in unusual cases, must be used to maintain order in labor disputes just as in any other kind of disturbance. However, because of the economic stakes frequently at issue in a labor dispute, the actions of the police in such a case are very important. All kinds of records of police action in labor disputes can be found, ranging from careful, judicious, and fair behavior in many cases to the brutality displayed in the Chicago Memorial Day incident of 1937.<sup>28</sup> It is likely that the average local official or member of the police force is not well versed in labor problems and labor-dispute settlement. Their intervention is inescapable at some times, but the less there is of it the greater the chance of adequate settlement.

Aside from steps taken on the spur of the moment to maintain order in labor disputes, the officials of many of the middle- and large-sized cities of the country have certain definite policies worked out for participation in the settlement of local labor disturbances. A study on this subject reported by the National Municipal League in 1941 is of interest.<sup>29</sup> It was based on returns of a questionnaire sent to all cities with a 1930 population of 30,000 or more. Since only twenty-six per cent of the questionnaires were returned in usable form, there is no way of knowing whether or not they represented a true cross section of all such cities. Of these cities, nearly forty per cent either had no set plan or adhered to a strict hands-off policy, doing no more than to maintain law and order. In the opinion of the man making the study, the hands-off policy, or the lack of policy, was due primarily to the relatively small size of most of the cities reporting and the absence of many severe labor disputes. It was thought that an outbreak of strikes would bring a change in policy such that more active participation would result.

For those cities that reported a set plan of trying to aid in the settlement of labor disputes, the methods ranged from requesting the aid of the federal Conciliation Service to establishing boards of conciliation and mediation. Since twelve and one-half per cent of the cities reported the policy of asking federal conciliation aid, this number may be added to those already reported as taking no action, since calling for federal aid does not represent significant local action. Combining these figures then indicates that slightly over half

<sup>28</sup> For a report of police action on Memorial Day, 1937, near the Republic Steel Company plant in south Chicago see: *Hearings on Violations of Free Speech and Rights of Labor* by the Senate committee investigating violations of free speech and rights of labor, chairman, Senator LaFollette, Part 14 of the Reports. Washington D. C.: U. S. Government Printing Office, 1937.

<sup>29</sup> Nunn, W. L., "Local Progress in Labor Peace." *National Municipal Review*, December, 1940, Vol. XXIX, No. 12, pp. 7-27.

of the reporting cities took no active part in labor-management dispute settlement.

Of the cities that engaged in active local participation in dispute settlement, the most common type of action was for the mayor, city manager, or councilmen to try to mediate. Over a third of all reporting cities—nearly three-fourths of those reporting direct action—used this type of approach. The cities so reporting were those in which the greatest number of disputes had occurred. Somewhat akin to this plan was the practice of a few cities of having special municipal employees, one of the secretaries to the mayor perhaps, whose duties were to keep an eye on the labor situation in the area and exert any possible influence to bring about settlement. New York, Los Angeles, Cincinnati, and Akron reported this form of action. Also similar was the plan used in two instances of naming special or permanent citizens' committees to act for the local government in seeking settlements.

A final method of dispute settlement was in use at the time of this survey. The best known and most publicized of these plans was that of Toledo; since that city has continued to be active in the field up to the present time, its experience will be noted. As a result of considerable labor trouble in Toledo that had required the aid of federal conciliators and of citizens in the community, Edward McGrady, then Assistant Secretary of Labor, suggested the establishment of the Toledo Industrial Peace Board. With newspaper support, the board was finally formed in late summer of 1935; it was composed of eighteen persons, five named by the Central Labor Union, five named by the Toledo Chamber of Commerce, and eight named by Mr. McGrady and another government official to represent the public.<sup>30</sup> The first director of the board was an employee of the federal Department of Labor chosen by Mr. McGrady; he later was forced to withdraw because many other cities were asking for similar service. The withdrawal of the federal agent caused the city council to take over the board by enacting one ordinance to establish it officially as a function of the city and another appropriating funds for its support.

The functioning of the board was limited to mediation; it did not arbitrate any disputes. Between its formation and the end of December, 1941, it reported participation in 331 cases. Of these, 285 were reported as settled.<sup>31</sup> Such evidence is always a little misleading, in that almost all industrial disputes are settled sooner or later whether there is outside aid or not. The more crucial question, is whether the mediation service brought a more prompt or just

<sup>30</sup> Nunn, W. L., *op. cit.*, pp. 7-10.

<sup>31</sup> Kaltenborn, H. S., *op. cit.*, p. 212.

settlement; this matter can be debated, but not settled. The Toledo board was discontinued in 1943 because the War Labor Board and other federal agencies were performing the same function.

In April, 1945, Toledo resumed its quest for a local solution to labor-management disputes. At that time the city council authorized the mayor to appoint an eighteen-man committee, equally divided between labor, management, and public representatives, "for the purpose of studying community management of labor problems facing the City of Toledo."<sup>32</sup> The committee was named with union and business representatives and with a judge, the vice-mayor of the city, a college dean, and ministers of three different faiths representing the public.

After its appointment, the committee, in a series of meetings, adopted a charter or set of principles that was basic to its functioning; this was made official through ratification by the city council in February, 1946. The twelve principles agreed upon are too lengthy for complete reproduction here, but the more important ones may be summarized. First of all is the stated recognition that labor has the right to organize without interference and management the right to direct operations of business. There is a statement that neither labor nor management "should" discriminate because of race, creed, or color, and an avowal that productive efficiency and technological improvements are desirable. A final principle other than those concerning the formation, financing, and functioning of the committee states the desirability of voluntary utilization of mediation, fact finding, and arbitration as methods of settling labor disputes.

Submission of disputes to the committee is voluntary, and the group can only offer its services. These do not have to be accepted. Compulsion, therefore, is at a minimum. When a dispute does come before the committee the first attempt at fact finding and settlement will be made by the executive secretary. If he fails, a committee or panel of members from the larger body will be named to try to mediate or, as a last resort, to obtain acceptance of arbitration. These guiding principles state a generally acceptable philosophy of labor-management relations.

The record of the committee looks good. Work stoppages caused less than one-half as much lost time in 1946 as in 1945;<sup>33</sup> whether any of this saving or all of it is due to the committee cannot be said, but part of it probably is. It has been reported that twenty strikes

<sup>32</sup> Resolution R-71-45, adopted April 23, 1945.

<sup>33</sup> Bureau of National Affairs, *Labor Relations Reporter*, June 2, 1947, Vol. 20, No. 9, pp. 72-74.

were averted between June 15 and December 31, 1946, through the efforts of the committee.

The new Toledo plan, which is, in essence, a modified continuation of the 1935 experiment, has drawn widespread attention. Many representatives of various cities have studied it, and a few have adopted or are planning to adopt similar programs. On January 22, 1947, the mayor of Minneapolis urged the United States Conference of Mayors to study the adoption of Toledo-type plans in other cities.<sup>84</sup> A resolution to make such a study was adopted by the conference prior to adjournment. Meanwhile, by late winter, 1947, Detroit, Louisville, and Windsor, Ontario were debating or planning labor-management-citizens committees.

Like certain other matters discussed in this chapter, local committees for the settlement of labor disputes are of more importance for their potential value than for their performance to date. Any movement in the direction of encouraging and aiding *bona fide* collective bargaining is a desirable one, since no other method that is compatible with economic democracy is as likely to produce long-run, healthful labor-management relations. There must be a certain legislative framework in which bargaining is carried on, but good relationships cannot be legislated into existence. That fact escaped many persons in 1947, when a sharply different philosophy was commonly held.

With a federal conciliation service and a number of state services, the need for local services is not apparent. In the Toledo case, however, since there was no state action in the settlement of disputes, there was not so much question. As long as there is no duplication or overlapping of services of local groups with those of others, local plans have much to recommend them. Efforts to settle issues locally instead of calling in outsiders should be able to put persons familiar with the problem on the job promptly. And the assistance of local groups, as long as they have the confidence of the disputants, is likely to be more readily accepted. In addition, the tripartite body with representatives of management, labor, and the public is likely to have a more realistic outlook on all the angles of the problem than will a single person from another place.

#### Local ordinances against discrimination in employment

A final area of local control of social and economic problems is in the regulation of employment practices within the municipality. Like their state counterparts, local ordinances are more important potentially than as a widespread current control. By mid-year 1947

<sup>84</sup> Associated Press release, January 22, 1947.

only Chicago, Milwaukee, and Minneapolis had passed such ordinances, although similar bills were under consideration in Buffalo, Philadelphia, St. Louis, Cincinnati, Detroit, Cleveland, Seattle, Los Angeles, Toledo, Spokane, San Diego, and Indianapolis.<sup>35</sup>

There are a number of reasons why local ordinances may be extended in number. First, they are likely to be easier to enact than state or federal controls because often there is more discrimination in cities than elsewhere and therefore more interest in the subject. Secondly, local enforcement may be more effective, since a local problem is to be handled. Finally, local ordinances probably can be used more effectively in educational programs than can regulations covering broader areas. Especially until federal or increased state action comes about, there is need of local controls. Even if the federal or state acts were to materialize, local controls still might be useful to improve on minimum standards set in the broader laws or to extend such regulations to groups not otherwise covered.<sup>36</sup>

Unlike the harmful competitive effects that child labor or minimum-wage controls are said to have on local industry, fair employment practice regulations do not threaten any disadvantage. There should be no economic hardship involved in treating persons alike regardless of race or religion.<sup>37</sup> In fact, it can be argued that there are social, moral, and economic benefits to be derived from such controls. The mayor of Minneapolis testified before a Senate hearing that his city expected to derive economic benefits from its ordinance. These would include an opportunity for minority groups to develop and utilize their skills fully. From this should come higher wages and standards of living, and from these greater markets for products of all workers. Moreover, public expenditures for relief, public health, and correction of delinquency and crime should decline.<sup>38</sup>

The first three municipal ordinances passed were very similar in content; all applied to the municipality, all contractors working for it, and private employers in the city.<sup>39</sup> There are fewer exemptions

<sup>35</sup> Elson, A., and Schanfield, L., "Local Regulation of Discriminatory Employment Practices," *Yale Law Journal*, February, 1947, Vol. 56, No. 3, p. 435.

<sup>36</sup> *Ibid.*

<sup>37</sup> Some might argue that in certain communities business concerns might lose trade by employing members of certain races. If an effective educational program let the public know that such an employment policy was required by law, it is likely any such loss would be slight and short-lived.

<sup>38</sup> Testimony of Mayor H. H. Humphrey before the subcommittee on anti-discrimination of the Senate Labor and Public Welfare Committee, Washington, June 19, 1947.

<sup>39</sup> Minneapolis also includes a specific prohibition against discrimination by labor unions. The broad prohibition in the other two ordinances of discrimination by "any persons" would seem to be applicable to unions, but no specific mention is made of union discrimination.



from coverage than in state laws, but Minneapolis exempts domestic service, employees of religious groups, and employers hiring only one person. Some of the ordinances under consideration make similar or broader exemptions. All prohibit essentially the same discriminatory practices as the state laws. The Minneapolis ordinance as it concerns private employees will serve as an example; it makes unlawful discrimination within the city "against any person in connection with any hiring, application for employment, tenure, terms or conditions of employment."<sup>40</sup> Fines, although not excessively high, are provided in all ordinances as enforcement measures. In addition, Milwaukee and Minneapolis allow imprisonment, the former only in case of default of the fine.

Since not all states extend the same powers to the municipalities within their boundaries, it is not certain that all cities can enact anti-discrimination ordinances directly. For example, it was decided that Detroit did not have the power to enact a measure proposed in 1946. Where such is the case it has been proposed that state legislation grant specific authority to cities to deal with the problem of discrimination.<sup>41</sup> It is somewhat difficult to grasp the fact that in our democracy many groups are opposed to, and many legislatures are afraid to enact, laws that prohibit racial or religious discrimination. Legislators should have little to lose in allowing cities the right to deal with the problem.

Enough has been said about state and local labor controls to show that they have an important influence on labor economics and labor problems. The great increase in the number of federal controls in the past few years has tended to leave the impression that states and especially smaller subdivisions no longer take any important action. This is not the case; even though federal controls expand there is much the local government can do. For example, the experience of Toledo stresses the fact that although there is a federal service to aid in settling labor disputes, much can be done at home by local persons to handle problems which arise. And the intelligence or lack of it with which public officials and the police conduct themselves when labor trouble does break out will do much to determine whether outside help is needed.

Even where federal regulations exist, state or local controls may well be passed to improve upon the minimum set in the federal law. There is no reason why the national minimum wage of forty cents per hour should not be raised in a state that wishes to do so. Or if a city wishes to cooperate in a federal or state effort, to stamp out discrimination for example, it may enact ordinances to supplement

<sup>40</sup> Fair Employment Practice Ordinance, adopted January 31, 1947.

<sup>41</sup> Elson, A., and Schanfield, L., *op. cit.*, *passim*.

those of the superior jurisdictions.<sup>42</sup> An increasing amount of federal control is likely to be the long-run trend in the United States, but there is no reason for states and localities to look only to Washington for action to meet their problems. Much can and should be done, and is being done, in the municipalities; as long as local controls meet or surpass those of the state and nation and as long as they are administered in an efficient, non-political manner, this is all to the good.

### Questions

1. Were the state labor relations acts forerunners of the Taft-Hartley Law? Justify your answer.
2. How do you explain the wave of state laws that was enacted in the postwar period to restrict in one way or another the activities of labor unions?
3. Do you consider the development of local labor dispute-settling plans, such as the Toledo Plan, wise or unwise? Are such plans more or less desirable than state and federal conciliation services?
4. What factors explain the relatively slow development of state or federal legislation directed against racial, religious, and other discriminatory employment practices?
5. How likely is it that special emergency action by mayors or Governors will prove to be an effective means of settlement of labor disputes? Why?
6. What do you consider the logical areas for federal, state, and local labor controls? Is it reasonable to have action at two or all three levels? Under what circumstances?

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<sup>42</sup> The Chicago Fair Employment Practice ordinance was labeled by the City Council as "an Ordinance providing for cooperation with the Federal Government agencies in preventing discrimination on account of race, color, or creed."

## CHAPTER XXV

### POSTWAR TENSIONS AND CONTROLS

#### Postwar demands for labor curbs

Discussion of most aspects of labor controls has been carried through the post-World War II period in previous chapters. This was due to the fact that no basic changes were made during the war years and immediately thereafter. However, in one broad area, that of management-labor relations, the war and postwar years brought marked differences. Those of the war years that amounted to compulsory arbitration already have been noted. The large degree of compulsion in the wartime measures left a strong desire on the part of both labor and management to get back to uncontrolled methods of dealing with each other.

As a consequence, when the war was over and the government controls were removed there was a great wave of labor trouble. The change was not so much in the number of strikes as in the number of workers involved and, especially, in the duration and amount of time lost. For example, where 0.1 per cent of total work time was lost in 1944 owing to strikes, 1.5 per cent of the time was lost in 1946.<sup>1</sup> Many of the strikes were in industries basic to our industrial production and did much to limit and restrict our reconversion efforts. They furnished the basis for a storm of protest against "irresponsible and power-mad" union officials.

The groundwork for this protest had been laid in the war period. There were many strikes of very brief duration during the war; as noted, the percentage of total work time lost through strikes was very small. However, these strikes were highly publicized and much antagonism toward unions was encouraged. The possibility that the gun or ammunition not made because of the strike would cost American soldiers' lives was very commonly voiced and decried, not only by the public but by workers themselves.

Even without the groundwork, the objections to the postwar strikes would have been tremendous. For the public had gone without automobiles, radios, refrigerators, and many other durable goods during the war. After the war, with the public having more

<sup>1</sup> *Monthly Labor Review*, February, 1947, Vol. 64, No. 2, p. 263.

money to spend than ever before, the work stoppages were associated with inability to get a new car, or radio, or something else. Since unions commonly took the initiative in calling for a stoppage of work when an agreement could not be reached, it was assumed that they were at fault. In reality, most work stoppages are not reasonably to be attributed to any one party. Suppose a union demands \$1.15 per hour and says its members will not work for less; if they have been receiving \$1.05 and the employer offers to pay the same amount in a new contract, it is not necessarily the fault of the union that work stops. True, the union ordered the stoppage of work, but it would have been willing to continue without interruption at \$1.15 per hour. In a sense, it could be said that the ensuing work stoppage was at the same time a strike and a lockout—a strike against the \$1.05 rate and a lockout against the \$1.15 rate.

To a majority of Congress, and probably of the public, this form of reasoning was not convincing. In their thinking, "labor" was not at fault so much as the leaders of the unions. Many were the stories, some of them unfortunately true, implying that high-handed leadership existed throughout all unions. From these sprang the reasoning that the unions, and especially union leaders, were at fault and must be subjected to controls.<sup>2</sup>

Much of the thought on the subject centered around the idea that the government had sponsored unions in the National Labor Relations Act. That being the case, it was argued, it was time now for the government to balance the scales again, that is, to curb unions and expand the rights of management in dealing with the representatives of its workers. In 1946 an attempt was made to do this; Congress enacted a bill that circumscribed many traditional union activities and practices. The measure was vetoed by President Truman.

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<sup>2</sup> Probably the strike of the United Mine Workers in November, 1946, brought anti-union sentiment to a peak. The bituminous mines were being operated by the federal government after they were seized, in late spring, 1946, when the private operators and union failed to agree and a prolonged work stoppage threatened. The union wanted to reopen the contract for further negotiations, but terms in the agreement gave the Interior Department a basis for declining to reopen. The union declared the contract voided, and, following their traditional "no contract, no work" policy, members began a walk-out. The government sought and got an injunction against continuance of the walk-out; it was disregarded, and a trial for contempt of court ensued. On appeal to the Supreme Court, *United States v. United Mine Workers of America*, 330 U. S. 258 (1947), a fine of \$10,000 against the union president was upheld. The \$3,500,000 fine levied by the lower court on the union was reduced to \$700,000 if the union canceled the walkout, but otherwise the full amount was to be retained.

This strike, in view of relatively short supplies of coal, threatened industrial production as well as cold homes and other discomforts. Many persons were convinced that if a union had so much power as the mine workers it was a threat to the public and should be curbed. Probably the drive to enact union curbs was given a strong impetus by this work stoppage.

He only postponed the day of reckoning, since the opposition to organized labor simply awaited another opportunity.

During the same year Congress enacted and the President approved an anti-racketeering act.<sup>3</sup> This was, in part at least, due to a Supreme Court ruling that a similar law enacted in 1934 did not prohibit the New York truck drivers' union from requiring trucks coming into the city from other areas either to take on a local union man or pay a day's wages if the incoming truck continued under its regular driver.<sup>4</sup> The new law declared it to be unlawful for anyone to obstruct, delay, or affect commerce by robbery or extortion or to conspire, participate, or otherwise be a party to physical violence in furthering such obstruction of commerce.

Prohibition of interruption to commerce was a clear power of the Congress. The only question concerned just what extortion meant. It was defined to mean obtaining money or other property from a person without consent or with consent if such was gained by wrongful use of actual or threatened force, violence, or fear. Relatively heavy fines and imprisonment were provided for violators.

#### Union attitudes toward controls

For many members of Congress, the anti-racketeering law was in no way an adequate substitute for union controls. Consequently, it was evident from the time of opening of the 80th Congress that another attempt would be made to enact legislative restrictions on the actions of labor unions. With this fact clear, a great struggle among lobbyists for and against labor controls developed, and the members of Congress were subjected to much pressure to take one stand or another on labor controls. Moreover, the President, when the measure finally reached his desk, was also subject to pressure. Even the general public was harangued by radio broadcasts and printed matter attempting to sway individual opinions.

Probably the unions used short-sighted tactics in the stand that they took on the issue. From the beginning until the day the Taft-Hartley Law was passed by Congress over the President's veto, their position was to oppose every suggestion of limitation upon the rights of unions. In the bargaining process, in order to reach some agreement, unions usually find that they are compelled to retreat at times from the early demands that they have made. However, in regard to labor controls, they took a motto which might be expressed as "no backward step." They had attained the National Labor Relations Act and they insisted that there be no changes

<sup>3</sup> 48 Stat. 979, 1946.

<sup>4</sup> *United States v. Local 807 of International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America*, 315 U. S. 521 (1942).

in it. There seemed to be a psychological block in the mind of most influential union leaders against conceding that any modifications were needed; many seemed to feel that even slight changes would pave the way for much more sweeping revisions. With so much sentiment in the Congress and all over the country for curbs on labor unions, it would have been wise for some of the more sober labor leaders to have worked with more reasonable management and congressional leaders on curbs that would have put an end to abuses by unions the existence of which even union leaders had to acknowledge. A willingness to discuss the need of some changes in the law regulating union-management relationships might have aided in bringing a much more moderate piece of legislation.

From the standpoint of justice as well as tactics, it would have been logical for the unions to have accepted certain changes. The labor movement of 1947 was considerably more powerful than that of 1935; some unions were both powerful and lacking in top quality leadership. The result was that there were cases, certainly not typical of the entire labor movement, of refusal by unions to bargain in good faith and of unfair advantage having been taken by unions of their members. Some such actions could not be justified, and for union leaders to have agreed to legislation to prohibit them would in the long run have been to do the labor movement a service in view of the public support it probably would have yielded.

#### The Labor Management Relations Act of 1947: general contents

Whatever the validity of such a point of view, the unions totally rejected it. In their attempt to defeat completely rather than soften and rationalize regulations, they lost, temporarily at least, very heavily when the Taft-Hartley Law was passed over presidential veto on June 23, 1947.<sup>5</sup> The law is sweeping in its contents and makes many changes in the National Labor Relations Act and in other federal controls. Each provision will need to be noted in detail; in summary, the law does the following: (1) puts a ban on the closed shop; (2) withdraws from foremen any federal protection of the right to organize; (3) guarantees more freedom of speech to employers than was allowed under the 1935 act; (4) establishes a number of unfair labor practices of unions; (5) puts limitations on strikes and lockouts resulting from termination or modification of contracts; (6) bans certain types of boycotts and jurisdictional strikes; and (7) establishes new rules for board certification of unions. In addition, the complement of the National Labor Relations Board was

<sup>5</sup> Labor Management Relations Act, 1947, Public Law 101; 80th Congress, 1st Session.

increased from three to five persons and the office of General Counsel, a very powerful position, was created. Let us note pertinent provisions in detail.<sup>6</sup>

The statement of policy of the act is of interest. It declares that in labor relations "neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety or interest." In keeping with this thought, the framers of the law declare:

"It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and prescribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."

After the purpose of the law has been stated, the reasons or findings on which it is based are given; these amount to a statement that some employers and some unions deny the reasonable rights of the other to organize or to conduct themselves as they see fit, and that in many instances these activities tend to cause labor trouble that will obstruct commerce. The law condemns both practices. Up to this point there can be little quarrel with the new law. But not all of the act is so acceptable.

### Changes in unfair labor practices of employers

Probably the most basic changes made by the law are the modifications in the unfair labor practices of employers and the extended list of unfair practices of labor organizations. There still are five unfair labor practices in the act for employers; at first glance, they look to be the same as those in the N.L.R.A., but there are a few basic changes that make them quite different. The employer still is for-

<sup>6</sup>Many publishers, unions, and business associations have issued analyses of the Taft-Hartley Law. Some of these that present varying points of view include:

*Labor Management Relations Act, 1947.* New York: Prentice-Hall, Inc., 1947.

*Labor Management Relations Act, 1947.* National Association of Manufacturers Law Digest, June, 1947, Vol. IX, No. 3.

*Legal Department Memoranda Nos. 1 and 2, Re: Taft-Hartley Act,* Chamber of Commerce of the United States.

*The Supervisors' Guide to the Taft-Hartley Act,* National Foremen's Institute, Inc.

Six bulletins on various phases of the Taft-Hartley Law, published by the American Federation of Labor are also of interest.

bidden to refuse to bargain collectively, to dominate a union, to interfere with an employee in exercising his right to join a union, or to discriminate against an employee for giving testimony under the act. However, the prohibition against discrimination in hiring or job tenure so as to encourage or discourage union membership is changed significantly. It will be recalled that the N.L.R.A. specifically provided that the prohibition against discrimination did not prevent an employer from signing an agreement with a non-company-dominated union that made union membership a requirement to hold a job. Not so the new act; there is a proviso attached to the discrimination clause, but it is quite different. The clause is quoted in part to show the wording and coverage of the proviso. The first part of the clause states that the anti-discrimination clause does not prohibit the signing of a union shop agreement; by exclusion, the closed shop agreement is no longer allowable. As for the union shop, it is allowable only under certain circumstances; these are:

"if such labor organization is the representative of the employees . . . in the appropriate collective-bargaining unit covered by such agreement when made; and . . . if, following the most recent election held as provided . . . the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement."

This proviso means that it requires an election before an employer can sign a union shop or maintenance-of-membership agreement. Further, in such an election, a majority of all the employees eligible to vote instead of a majority of those voting must cast ballots in favor of the union shop. Thus, if a certain bargaining unit has 5000 employees and only half of them choose to vote in an election, a unanimous vote in favor of a union shop would still not be sufficient to permit it. Or, if three-fourths of the eligible persons vote and cast two-thirds of their ballots in favor of the union shop, it still would not be lawful. Such a ruling is indeed a strange one to come from an elected body; it is probable that most of the members of Congress would not be there if the rules of election required that a majority of all persons eligible to vote was necessary to put a candidate into an elective office. The analogy is not perfect, but there is enough similarity to warrant comparison.

There is a further limitation on the anti-discrimination section, namely:

"that no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable



grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

Perhaps the most significant thing about this limitation is the liberty given to employers. All that is required for them to flout a union shop clause, even after voted-in according to the rules, is to maintain that they have reasonable grounds for believing that the union is denying membership to persons who have paid or offered to pay their dues and initiation fees. Since, under a union shop agreement, an employer is free to hire whomever he pleases so long as such persons join the union within a certain period of time after their employment, it is possible to hire persons that the union would not admit to membership. Even if the union would not allow the worker, let us say a known stool pigeon, disrupter, or Communist, to join, as long as he offered to pay his initiation fees and dues it could not legally enforce a demand that he be discharged from his job.

The above restrictions of the anti-discrimination section limit the protection of unions very much. They create an unusual election requirement that amounts to a substantial stumbling block. And once a union shop is in effect, it still is not possible for a union to have dismissed from the plant a member who has broken some rule of the union as long as he keeps up to date with his dues. The union may expel the member, but in such a case, the agreement ceases to function; he may continue to work in the plant without union membership.

It is important to note that the restrictions on the closed and union shop do not affect agreements that were entered into before June 23, 1947, the date of final enactment of the law. For sixty days after that date unions were free to negotiate such agreements, but pacts concluded in that period could run only for one year and not later than August 22, 1948. After August 22, 1947, closed shop agreements were no longer a fit subject for negotiation and union shop agreements could be negotiated only after the procedure already noted; that is, election. However, even if the union won a majority vote approving the demand for a union shop, the employer was not required under the terms of the law to grant it. He might refuse to do so, and unless the union could force acceptance by its own bargaining power nothing could be done about it.

There is a further limitation on the negotiation of union shop agreements. As has been noted, federal law takes precedence over

state law, but such is not the situation in this case. Provision is made that in a state having an anti-union shop law, that measure is effective despite federal law. Therefore, with congressional sanction, workers in about a dozen states cannot bargain for a union shop regardless of whether or not they wish to do so.

Another provision of the act amounts to a limitation of the employer's duty to bargain. This came in by way of a restrictive definition. The law states that an employer is required to bargain with representatives of his employees under certain circumstances; in order to clarify this responsibility, the act defines the term "employee." The one factor of interest at this point is the clause in the definition stating that the term "employee" does not include "any individual employed as a supervisor." Of recent years there has been a considerable development of unionism among foremen and supervisors in the lower echelons. After considerable wavering, the N.L.R.B. decided that foremen were to have the same right to unionize as any other group of employees. The Taft-Hartley Law changes this situation considerably; no longer can a group of supervisors who wish to organize invoke federal aid to back their attempt to gain recognition. The employer can refuse to recognize such a union and be within the law. Foremen or other supervisors are still free to organize if they choose, but they must do so under their own power.

### Unfair labor practices for unions

There are a number of unfair labor practices of labor organizations or their agents that are important. The justness of some of them is entirely defensible; that of others is open to question. The first prohibition is the denial of the right of a union to restrain or coerce either employees in exercising their right to join or not to join a union or an employer in the selection of representatives for collective bargaining. The general tenor of this prohibition is not to be criticized, but there is a great deal of leeway in interpretation possible. Because there is no definition of what "restrain or coerce" means it may be very difficult to determine when the provision has or has not been violated.

The second prohibition is the counterpart of the limitation on employer discrimination previously noted. No union may try to induce an employer to discriminate against an employee because of non-membership in the union, except for non-payment of dues. As was stated, this seriously weakens the union shop clause once it has been won.

Third is the statement that it is an unfair labor practice "to refuse to bargain collectively with an employer." In connection with this

prohibition, a section is devoted to the subject of what is *bona fide* collective bargaining. It is defined as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party. . . ." Other parts of this section will be examined later; here it will be noted that there is still some question as to what collective bargaining includes. When a meeting is held at a reasonable time and when conferring is done in good faith are not easy to determine. However, unless a tortured interpretation of this provision develops, there is little to criticize; it will be unusual for a union to violate this section because the primary aim of conscientious unions is to bargain collectively, and when there are *bona fide* violations attempted it seems reasonable to forbid them.

A fourth prohibition denies to unions the right to engage in secondary boycotts and jurisdictional strikes. These are unfair labor practices only when engaged in to accomplish certain purposes, but the prescription of the illegal goals is so broad that much common union action may be denied. For example, under this section, a union may not picket an establishment to try to compel it to stop using non-union-made goods. Nor may it try to get the employees of such a plant to refuse to work on the non-union goods. The jurisdictional strike is indeed hard to justify, but the prohibition of the use of the secondary boycott in some instances is a severe blow to union action. Interunion solidarity demands that there be opportunity for one union to support another by the non-use of goods or other similar action. However, any request for supporting action can now be interpreted as an unfair labor practice; the provision weakens union bargaining power.

Fifth, unions are prohibited from requiring workers to pay exorbitant membership fees. It is the problem of the board to determine when a fee is "excessive or discriminatory." With no exact method of determining excessiveness, a few interpretations must appear before it can be decided just how harsh this prohibition may be. It is very doubtful, however, if many unions will be hurt by this provision; exorbitant fees are overpublicized and are not typical of the majority of unions.

A final statement prohibits engaging in any act that would "cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value in the nature of an exaction, for services which are not performed or not to be per-

formed." Although the prohibition presumably is aimed at forced hiring of "standby" local musicians, truck drivers, and the like, when non-local persons are working in an area—in other words, outright feather-bedding—it is so worded that it can be used in many other ways. For example, a paid vacation is a sum paid when services are not rendered; so are the mid-morning and mid-afternoon rest periods that are found in many plants. An attempt by a union to force such concessions from an employer might be held an unfair labor practice. It seems unlikely that such will be the interpretation, but the wording would appear to allow it.

#### Limitations on the right to strike under union agreements

Apart from the specification of unfair labor practices, the provisions of the act pertaining to bargaining procedure are sharply restrictive of common union practice. The general duty of meeting at reasonable times, bargaining, and putting the results in writing has already been noted. There are further provisions; where a collective bargaining agreement exists in an industry affecting interstate commerce, it cannot be terminated or modified unless the party desiring the change does the following: (1) serves a written notice of desire of change at least sixty days prior to the termination or date of desired change; (2) offers to meet with the other party to negotiate a new or changed contract; (3) notifies the Federal Mediation and Conciliation Service within thirty days after notice of the existence of a dispute (if settlement has not been reached), and at the same time notifies the state conciliation service, if such exists; and (4) continues the existing contract in full force and effect for sixty days after such notice is given (the period is lengthened to the duration of the existing agreement if a notice was given more than sixty days in advance).

To enforce these provisions, the law provides that any employee who engages in a strike within the sixty-day period shall lose his status as an employee unless the employer chooses to retain him. This allows the dismissal of workers without any recourse to the N.L.R.B. if they strike during the required waiting period. The first year of experience under the act offered no conclusive proof as to whether or not the waiting period increases the number of settlements; judging from experience with the "cooling-off" provisions of the War Labor Disputes Act, it is doubtful if the desired result will be achieved.

As with bargaining procedure, the provision concerning majority representation in one disliked by unions. It is specified that although a properly designated union is the exclusive bargaining agent of all employees, any employee or group of employees may have

grievances adjusted "without intervention of the bargaining representative." The settlement must be in keeping with the union's agreement, however, and the representative must be allowed to attend the adjustment meeting if he chooses.

### Bargaining units and representation

The new law has something to say about the naming of the appropriate bargaining unit. The board still has the task of designating the appropriate unit, but there are certain statutory guides as to how the units can be designated. First of all, a unit may not be named that has within it both professional and non-professional employees unless a majority of the professional employees vote in favor of being included. Secondly, the board may not rule a craft unit as inappropriate for bargaining, even though previously the board has named a broader bargaining unit, unless a majority of the persons in the craft unit vote against separate representation. The third prohibition is that the board may not name as an appropriate unit one that includes guards and other employees in the same organization.

The above regulations strike a heavy blow at industrial unionism. Whatever the intent of the section noted above, it makes mandatory the separate handling of craft, professional, and guard groups unless, in the case of the first two groups, the persons therein desire to be included in the broader grouping. The whole tenor of the section is to encourage small bargaining units. It is doubtful if this provision serves in general the interests of either the employers or the employees, unless it permits anti-union employers to play one group against another. Smaller units mean, for employers, more agreements to be reached, more time spent in collective bargaining, and more chances of dispute and misunderstanding. And for unions smaller units are likely to result in less bargaining power.

As noted, the union shop must be voted for by a majority of those persons eligible to vote in an election to determine the question. Certain conditions, however, must be met before an election may be held. Presumably, only a union will ask for a union shop. Therefore, an election will be held only when a union so requests and files a petition alleging that at least thirty per cent of the employees in the unit desire such an agreement. If a union shop is in effect, it may be discontinued if thirty per cent or more of the employees in the bargaining unit file a petition alleging that they wish the agreement rescinded and if those desiring the change win the election that the filing of the petition brings. In either case, the board shall take a secret ballot of the workers in the unit and certify the

results to union and employer. However, in no instance may a vote be taken until one year after the previous valid election.

The board still has the task of certifying a union as the proper representative of the employees in a given bargaining unit. Under the old law, an employer could request an election only when two or more unions each demanded recognition; a union had more opportunity to request an election. Under the new law, however, the employer can request an election even when only one union asks for recognition. If a petition is filed and if the board determines that a question of representation affecting commerce exists, an election can be held. In these elections only a majority of the voting employees is necessary for certification of a union.

### Required union reports and other duties

The law provides that no action shall be taken to certify a union or investigate a dispute unless the union has filed certain documents and reports with the Secretary of Labor. The required materials include the constitution and by-laws of the union and a report that includes the following: (1) name and address of the union; (2) names, titles, and salary and allowances of its three principal officers and any others for whom the salary and allowance is more than \$5000 per year; (3) the manner in which these officers were put into office; (4) the initiation fee or fees required of new members; (5) the regular dues that members are required to pay to remain in good standing; (6) a detailed statement indicating membership requirements, procedure for ratification of agreements and for authorization of bargaining demands and of strikes, audit of records, rules for expulsion of members, and a number of other matters. The union also must file with the Secretary of Labor a financial report of assets and liabilities and of receipts and disbursements; copies of this report must be furnished to all members of the union.

No action in behalf of a union may be taken by the N.L.R.B. unless it has on file certain statements of membership in political or economic organizations pertaining to the union. Each officer of a labor organization "and the officers of any national or international labor organization of which it is an affiliate or constituent unit" is required to file a statement "that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods." This section has proved to be one of the highly controversial ones in that

it can penalize local unions for the actions of officials far removed from them.<sup>7</sup>

The act denies to employer and union the right to agree to a checkoff of union dues without the approval of individual employees. In order for union dues to be deducted by the employer and paid to the union treasury, it is necessary that the employer have a written and signed authorization of the deduction from each individual worker. This permit may not be irrevocable for a period of more than one year or the duration of the agreement, whichever comes first. Once the signed permits are filed, the law does not require that new ones be supplied each year. It does require, however, that workers be allowed to withdraw their permission of check-off at least every year or when the agreement expires.

Employers are also prohibited from contributing to union health and welfare funds unless a number of requirements are met. These requirements include, but are not limited to, the following: (1) contributions must be held in trust for payment of medical or hospital care, insurance, pensions, or injury benefits to employees or their dependents or families; (2) the plan of the welfare fund must be worked out in detail and stated in writing; (3) the trust fund must be audited annually; (4) contributions for pensions or annuities must be segregated and used only for those specific purposes; and (5) employers and employees must be equally represented in the administration of the fund. These requirements are not far out of line with the provisions of many current welfare funds. Although commonly financed only by the employer, joint administration of an established group of benefits is frequently found.<sup>8</sup>

The law also includes a very broad restriction on political contributions. Other groups also are subject to restrictions under the law, but the part dealing with labor union actions provides that it is unlawful for any labor organization "to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative . . . are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices." This provision has caused a storm of protest from labor organizations and liberal minded citizens; it has been flouted from the first by labor organizations in the hope of getting a test case before the courts. Penalties of a \$5000 fine on any organization or

<sup>7</sup> This statement applies only to officials of the union with which the locals are affiliated; only in the case of federal locals directly affiliated with the A. F. of L. or C.I.O. do the affidavits of the national officers of the federations of unions have any effect on the ability of the locals to demand action on their behalf from the N.L.R.B.

<sup>8</sup> *Monthly Labor Review*, February, 1947, Vol. 64, No. 2, p. 191.

of a \$1000 fine and imprisonment of one year on an individual are permissible if the government decides to try to enforce this section of the act, provided the courts hold it valid. There is much question, however, as to whether this part of the law deprives certain groups of constitutionally guaranteed freedom.

Apparently in an attempt to make union-employer agreements more enforceable, the law provides that a union can be sued for a violation of a collective bargaining agreement in industries affecting interstate commerce, whatever the amount involved in the controversy. This means that the union may be sued as an entity and not as a group of individuals each separately responsible for its actions. This is not entirely an innovation, in that there had been previous instances of suits against unions; such suits were not common, however.

This provision has brought a rapid change in the content of collective agreements. The law says that unions may be sued and not that they must be; therefore, in agreements under negotiation, various unions have demanded and have had written into some of the contracts a provision that the employer will not exercise his right to sue in case of wildcat strikes, for example, or of other actions of the members.

The majority of the provisions noted above deal with management-labor relations and must be applied by the National Labor Relations Board. Obviously, its load of work was to increase heavily; two new persons were added, making a five-man body. The two new appointments probably were in part to take care of the anticipated increase in work-load and in part to permit the addition of two members sympathetic to the new act. In addition, a new position was created that of General Counsel of the Board. This man, whose appointment is by the President and subject to confirmation by the Senate, has "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints . . . and in respect of the prosecution of such complaints before the Board." This officer also has control over attorneys of the board and the regional staffs. He also has the job of interpreting the meaning of the new act. Indeed, the office of General Counsel is the key position in the new N.L.R.B.

Once all the formalities and requirements before the board are met, it may consider the case of a union; the procedure followed is similar to that of the old N.L.R.B. There are some differences; for example, the board will not issue a complaint on an unfair labor practice that occurred more than six months prior to the filing of the charge. After the examination of an issue, the board—in the final analysis, the General Counsel—may issue a complaint and hold a



hearing if it so chooses. After the hearing, the board has the choice of dismissing the complaint, modifying it, or issuing cease-and-desist orders if it finds unfair labor practices. When an order is not obeyed, the board has the power to petition any Circuit Court of Appeals for enforcement; similarly, a person aggrieved by a board order may request in the same courts a review of the order.

Further court action is possible under the new law; once the representatives of the board have issued a complaint charging an unfair labor practice, it can petition a district court for a temporary restraining order. If the proper board representative believes there is violation of the secondary-boycott and jurisdictional-strike provisions, he is directed to seek injunctive relief. Such an order is supposed to be handed down only after hearing "unless substantial and irreparable injury . . . will be unavoidable" without its immediate issue. And in granting injunctive relief, the courts are not to be limited by the Norris-LaGuardia anti-injunction act. In either of the above cases, whether the injunction is to enforce a board order or to direct a stoppage of an unfair labor practice or otherwise grant appropriate relief, failure to observe the writ makes a person liable for punishment for contempt of court. Another enforcement penalty of the act is a potential fine of up to \$5000 or imprisonment up to one year or both for those persons who "willfully resist, prevent, impede, or interfere with any members of the Board or any of its agents or agencies in the performance of duties pursuant to this Act."

#### Dispute settlement under the act

The law requires extensive modifications in the federal dispute-settlement machinery and also lays down new and far-reaching rules for the conduct of disputes that threaten a national emergency. The Conciliation Service of the Department of Labor was abolished and a new independent agency outside the Department created; it is called the Federal Mediation and Conciliation Service. The functions of the old Conciliation Service were transferred to the new agency, whose task is, in fact, the same as that of the service of the Labor Department. However, the fact that it is an independent agency responsible to the President might tend to give it greater stature and to make employers believe it to be more impartial than when it was a part of the Department of Labor.

The policy, stated in the law, that is to guide the new agency is as follows:

"Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes

arising over the application or interpretation of an existing collective bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases."

However, the agency is empowered to offer its services in any labor dispute in any industry if the dispute is thought to threaten a substantial interruption of commerce. The director of the new service is empowered to establish any suitable procedures that he sees fit for cooperating with state and local dispute-settlement agencies.

Since it was felt that the old service had sometimes been somewhat unrealistic and impractical in its policies, the new law created a twelve-man National Labor-Management Panel, to be appointed by the President. The members of the panel are to be equally divided between labor and management representatives. It is the duty of the panel—not a full-time body, but meeting only when summoned—to advise the director of the service at his request. In particular, their advice is to be given on the way in which voluntary settlement procedures may be applied to disputes that threaten the general welfare.

Thus, except for a divorce of federal dispute-settling service from the Labor Department and the creation of the advisory body, there is no great change embodied in this part of the law. It remains to be seen whether the move was a wise one. Some are of the opinion that the shift probably was made more to decrease the sphere of action of the Labor Department than to improve federal dispute-settling machinery.

Strikes by government employees and strikes that threaten to result in national emergencies are singled out for special attention in the law. Specifications for the handling of strikes by federal government employees or employees of agencies of the federal government are brief and to the point. Such strikers are to be discharged at once and to lose their civil service status. They may not be reemployed by the federal government or its agencies for at least three years, and then only as new employees.

Finally, there are provisions for dealing with national emergencies threatened by labor disputes. The first step in dealing with a strike or threatened strike that would affect an entire industry or a substantial part thereof and imperil national health and safety is for the President to appoint a board of inquiry to look into the issues in the dispute and report to him, making no recommendations. There is no limit on the size of the board, which is, of course, not permanent and will vary in composition from one dispute to another.

On receipt of the report from the board of inquiry, the President

may, if he chooses, direct the Attorney General to petition in any federal district court for an injunction directing that the strike or lockout not be called or that it be stopped if it has begun. If the court finds that there is a threat to national health and safety, it is not bound by the Norris-LaGuardia Act and may grant the injunction. However, such an order is subject to review by higher federal courts.

On the issuance of such an injunction, the President shall reconvene the board of inquiry that previously reported on the issues involved. For sixty days after the injunction is granted it is the duty of the parties to the dispute "to make every effort to adjust and settle their differences." In their attempts to settle the dispute the parties are expected to make all possible use of the services of the federal government. If at the end of sixty days the dispute is unsettled, the board of inquiry is to report to the President stating the position of each party and the final offer of the employer. This report is to be made available to the public.

Under this circumstance, the National Labor Relations Board is required to take within the next fifteen days a secret ballot of the employees of each employer involved in the dispute as to whether they wish to accept the final offer of settlement made by the employer. The results of the vote are to be certified to the Attorney General within five days of the balloting.

When the results are certified or a settlement has been reached, whichever occurs sooner, the Attorney General is to request the issuing court to dissolve the injunction; this petition shall be granted. The President shall, on dissolution of the injunction, make a report to Congress of the steps taken, with his recommendation as to the further action which that body should take. If no action is taken and if the injunction is dissolved promptly, the parties are finally free, after a maximum of 80 days of enforced negotiation, to battle out the issue as they see fit, so long as their actions do not violate some other section of this broad act.

All sections of the law were in full effect in August, 1947, but not all provisions had become effective at the same date. Although primarily of historical interest, these varying dates may be summarized briefly. Most provisions of the law went into effect sixty days after its enactment on June 23, 1947; that is, on August 22, 1947. Thus, the prohibition against closed shops and restriction on union shops took effect then, the Conciliation Service was transferred out of the Department of Labor at that time, and prohibition of dues check off without authorization became effective. On the other hand, unfair labor practices were prohibited from the date of enactment, as were the provisions concerning national emergencies,

suits against unions, political contributions, secondary boycotts and jurisdictional disputes, and strikes by government employees. If a union had an agreement containing a union security clause, closed or union shop, that was signed before June 23, 1947, it was not affected until its expiration; similar agreements reached between June 23 and August 21, 1947, could run for one year. A checkoff agreement could run until the expiration of the agreement or July 1, 1948, whichever came first. Thus, the law became effective on a piecemeal basis.

### Enforcement provisions

A number of the enforcement measures of the law have been noted in discussing various of its restrictions. Others have not been mentioned, so it is well at this point to draw them all together. There are four acts under the bill that are punishable by criminal penalties of fine or imprisonment or both. As has been noted, wilful interference with any member of the board or its agents is punishable with fines up to \$5000 and imprisonment up to one year or both; violations of the restriction on political contributions are punishable with fines up to \$5000 for an organization or up to \$1000 and imprisonment up to one year for individuals. In addition, an employer guilty of checking off dues or paying into welfare funds in violation of the law is liable to fines up to \$10,000 or imprisonment of not more than one year or both. A union agent who falsifies the non-Communist affidavits required under the law is liable for \$10,000 in fines and imprisonment of up to ten years. The reservation of the heaviest fine and imprisonment for the last offense is a typical result of the anti-Communist hysteria that swept the nation after the war.

It has already been noted that unions are suable for violations of collective bargaining agreements; employers are similarly liable to damage suits for such violations. A union also can be sued for injuries resulting from engaging in a secondary boycott or jurisdictional dispute. These are the only bases for damage suits against a union.

In one situation, an employer is allowed to get an injunction; that is to prevent the making or enforcing of agreements containing welfare fund or checkoff provisions in violation of the law. The board has much more leeway; it can ask for an injunction after a complaint of an unfair labor practice has been issued. In addition, the representatives of the board are required to petition for an injunction in the case of a jurisdictional strike or a strike for an unlawful purpose. Finally, as noted, the Attorney General can request an injunction in a case that threatens a national emergency.

The final means of enforcement is through the cease-and-desist orders of the board, which can be carried to the courts for enforcement, and the loss of rights before the board by unions and employees. Cease-and-desist orders are not a new development in the law, since the same general situation existed under the old N.L.R.A. Loss of any protection of employee status because of illegal strikes and of any right to government action on behalf of a union not filing proper reports seem to be relatively heavy penalties. However, in the year immediately following passage of the act, the latter penalty was not sufficient to bring observance by some of the more powerful unions of the required filing of non-Communist affidavits. In fact, for a strong union that is well established and has little competition from other unions there is no strong incentive to observe this part of the law. However, where one union faces competition from another that has complied with this part of the law, the inability to get on the ballot in case of an election to determine the bargaining agent gives a strong incentive for compliance.

#### Evaluation of the Taft-Hartley Law

Such was the method which Congress offered to the President, in early June, 1947, for the solution of labor-management disputes. The President did not agree, presumably on the counsel of the advisers about him, that the act would do what it was supposed to do. Therefore, he vetoed the bill. This was to no avail, since Congress disregarded his veto message and passed the act by the required two-thirds majority. A few of the evaluations in the President's message are of interest.<sup>9</sup>

The first reason given for the veto was that the bill was contrary to the traditional government policy of leaving as much freedom as possible in collective bargaining. These extended controls were, in the President's view, especially bad because the general trend of the time was to remove as many controls as possible. Secondly, President Truman thought the bill would not improve human relations in industry. "Cooperation cannot be achieved by force of law. We cannot create mutual respect and confidence by legislative fiat." In addition, the bill was held to be unworkable and unfair in that it did not deal equally with employers and employees. Each of these points was defended in detail, but they need not be expanded here.

Few congressional enactments have caused as much comment, discussion, and disagreement as the Taft-Hartley Law. Labor

<sup>9</sup>The text of the veto message is quoted in: Bakke, E. W., and Kerr, C., *Unions, Management and the Public*, pp. 881-889. New York: Harcourt, Brace and Company, 1948.

groups have frequently referred to it as the "slave labor bill." Other persons connected with business and professional groups have looked upon it as a desirable piece of legislation that was long overdue. The gap between the two lines of reasoning did not narrow in the first year after the enactment.

For example, the Department of Manufacture of the United States Chamber of Commerce stated:

"At long last, equality before the law is recognized in federal labor legislation. Collective bargaining under the law is now accompanied by legal rights and responsibilities placed on both parties. . . . Now, too, for the first time, the Congress has come to grips with some of the abuses in the field of labor-management relations, and the new law makes far-reaching provisions to ban them."<sup>10</sup>

The United Steelworkers of America, whose leader is also President of the C.I.O., did not see the subject in the same light. On July 2, 1947, the Executive Board of that union adopted resolutions that in part denounced the new law and board "as instruments clearly designed to oppress unions and to destroy the living standards of American workers." In a message transmitting these resolutions to the field staff, Philip Murray stated:

"In the place of the Wagner Act and the Board which administered the Wagner Act, we have an act and a board which have been set up to *discourage* organization, not to promote it, to *undermine* unions, not to protect them, to *discourage* collective bargaining, not to encourage it, to invite law suits against unions in *the place of peaceful collective bargaining*."<sup>11</sup>

Any number of similar statements on one side or the other could be found if citation of more was desirable, but they would do little except emphasize, where emphasis is not needed, the diametrical opposition of those for and against the new law. It is not easy to evaluate the validity of the positions of the two parties because in good part they spring from a difference in basic attitude toward labor relations and what is a sound basis for healthful and peaceful management-labor relationship.

Essentially, the proponents and opponents of the law split over the desirability of a strong labor union structure in the nation. Although few supporters of the law would admit that they are anti-union in their attitude, that probably is the case. They see the

<sup>10</sup> Labor Management Relations Act, 1947, Foreword.

<sup>11</sup> Legal Department Memorandum No. 1, *op. cit.*, pp. 1-2. (Italics Murray's.)

many abuses in the labor movement that must be admitted by all; then, as a result of a deep-seated distrust of unions and union leaders, they assume that the abuses are typical of almost all unionists who find themselves in a position to practice the abuse. Once that conclusion is reached, it follows that regulation is necessary to make it unlawful for unions to engage in the abusive practice.

Probably the great majority of the persons who follow this line of reasoning base their economic thinking on the idea of a *laissez faire* economy being best. This does not mean complete *laissez faire*, but rather a government policy that leaves business relatively free to do as it pleases. It then is assumed that the general honesty of businessmen, the competition that they must face from other businessmen looking for workers, and the refusal of workers to accept substandard jobs will force payment of proper wages and the provision of reasonable conditions of work. It is assumed, without too much proof, that the bargaining power of workers even without organization or with very weak organization is adequate to cope with that of employers. In fact, in the thinking of many bargaining power is not even necessary because the interests of employers and workers are alike and, therefore, employers will automatically do that which is best for workers.

Those who oppose the Taft-Hartley Law work from an entirely different set of assumptions. They hold that workers cannot depend on either the magnanimity or enlightened selfishness of employers to bring to them good wages and working conditions. These persons argue that in order to equalize bargaining power and allow workers to demand, rather than ask for, the conditions which they want, strong, non-employer-dominated unions are needed. They argue further, and with good reason, that stable labor relations must be based on mutual respect and trust of each party for the other, and that legislation cannot provide this condition.

The foregoing paragraphs reduce to its essentials the split between those for and against the Taft-Hartley Law. It cannot be argued convincingly that the law was not intended to restrict and weaken unions, because many of the provisions could hardly have had any other basic purpose. It is hard to imagine that such was not in many minds when a favorable vote by a majority of all employees in a unit was made a necessary prerequisite to negotiation on a union shop. The curb on political contributions makes for some limitation on political action; although it does not prohibit expenditure for registration campaigns and for political education programs, it restricts the area of permissible political action. Political as well as economic action is a desirable part of the program of any union trying to use all possible means of achieving its goals. The

enactment of the law under consideration is itself proof of the desirability, from the union point of view, of political action to get and keep the "right people" in office.

The exact results of the new law are not yet discernible. While test cases on its constitutionality may be rushed, the validity of a number of questionable provisions will not be known for some time and, therefore, results cannot even be predicted. One thing is clear; even though the law may be supported in its entirety, it is not the slave labor bill that it has been called. There is no limitation on the rights of individuals to quit their work at any time. To strike, that is, to stop work but not sever the job relationship, is restricted as to time, but this is hardly sufficient to justify the reference to a slave labor bill.

No one can say to what extent unions may be broken as a result of the law. Undoubtedly, the employer who is desirous of fighting a union is given more ways of doing so. But collective bargaining with non-dominated unions has in many cases proved satisfactory to the employer as well as to workers. Many businessmen have no desire to disrupt the peaceful relationships that they have built up and will keep on dealing with unions in much the same manner as before.

On the other hand, the law has brought changes in the collective bargaining demands of unions. For example, the steelworkers' union, shortly after the law was enacted, resolved that in future contracts it would refuse to include a no-strike clause. This was decided upon as a way of coping with the provision of the law that unions may be sued for breach of contract; it did not mean that the union contemplated more strikes. There are, however, in any union wildcat strikes that occur despite all attempts of union officials to prevent them from developing. Therefore, some unions are trying to lessen the chance of suits by cutting out one provision that is likely to be violated on occasion.

Another attempt of some unions to circumvent the suability clause of the law is to demand that there be included in any agreement a provision that an employer will not avail himself of his right to sue under certain conditions. Since the law permits rather than requires suits, it is thought that such a clause included in an agreement will furnish an escape.

The typographical union developed still another means of trying to escape from this part of the law. This was to state a series of conditions under which they were willing to work. If the employer allowed these conditions, they worked; if not, they did not work. However, they refused to put the terms under which they would work in writing or to sign an agreement embodying the terms.



Shortly after this plan was evolved, the National Labor Relations Board issued a complaint against it as an unfair labor practice, since, it will be remembered, reducing an agreement to writing is one of the requirements of *bona fide* collective bargaining that is written into the law. Subsequently, a trial examiner ruled that the union had committed an unfair labor practice.

In time, other results will develop and some of the practices just noted may change or be extended. Taken as a whole, the Taft-Hartley Law probably has gone too far. That there were weak spots in federal labor-relations law is not open to question; some revisions were in order. Some unions had grown more rapidly than had the abilities of some of their leaders; others "threw their weight around" without regard for the effect of their actions on the public. But to use such a situation as a basis for a law as sweeping and restrictive as the one in question was unwise to say the least. Although labor disputes shortly after the law went into effect were at an unusually low level, it is doubtful if the Taft-Hartley Law will prove itself to be a sound basis for peaceful labor relations. It was, perhaps, a misguided but sincere effort to effect some changes that needed to be made; as its less desirable provisions become evident it may be possible to revise them.

### Postwar wage issues

A specialized phase of management-labor relations brought federal regulation in the postwar period. These particular difficulties arose out of the Fair Labor Standards Act and the interpretation of wording used therein. It will be recalled that the 1938 law provided certain minimum wages and a basic work week of forty hours beyond which employees were to be paid time-and-one-half for all hours of work in the week. But since the law did not define work it was not clear whether time spent in activities such as walking to a work place in the plant, or sharpening tools, or putting on protective clothing was to be construed as work time.

In many occupations considerable time is spent in going to and from the place of work or in performing other activities that are necessary on the job but are not a part of it, such as sharpening tools or cleaning up around a machine. The question arose as to whether such time should be compensated as a part of the period of work. In cases testing this issue the Supreme Court in 1944 and 1945 supported the claim of the United Mine Workers Union that travel time on the employer's premises should be compensated as a part of the work day.<sup>12</sup> In coal and metal mining and in lum-

<sup>12</sup> *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America et al.*, 325 U. S. 16 (1945). *Tennessee Coal, Iron and Railroad Co. v. Muscoda Local No. 123*, 321 U. S. 590 (1944).

bering, however, the time spent on the premises of the employer in traveling to and from work may be considerable, so that decisions such as the above did not indicate clearly the attitude that would be taken on relatively short periods of time spent in travel and preparation for the job in factories and other places of employment of like nature.

In 1946, in a highly publicized case, the issue of "portal to portal" pay for factory workers came before the Court;<sup>13</sup> representatives of the workers bringing suit contended that employees were then able to punch the time clock as much as fourteen minutes before work time or after quitting time at lunch and at the close of the day without being paid for the extra time. Therefore, a worker could spend as much as fifty-six minutes per day on the premises of the employer without pay; however, nowhere near this amount of time was spent by most of the workers. It was insisted that the workers had to check in early since not all could punch the clocks at the same time and some had to spend three or four minutes walking to their work place, putting on protective clothing, getting tools ready, or otherwise preparing for work. Much the same actions had to be repeated in reverse at the close of the work period before the workers departed for home.

The workers contended that the time unavoidably spent on the employer's premises, whether used in actual production or not, should be compensated by the employer. Since the Mt. Clemens Pottery Company refused to pay for such service, the dispute was taken to court. The federal district court ruled that the workers had a reasonable claim and that a relatively small amount of back pay was due for travel time and preparatory activities. The company, not satisfied with the ruling, appealed it, and the Circuit Court of Appeals reversed the ruling of the lower court, holding that the workers were not entitled to back pay. From this ruling an appeal was taken to the Supreme Court.

The High Court, although it did not determine the size of a reasonable claim in the particular case, did support the contention that time necessarily spent on the premises of the employer even though not engaged in productive work could be construed as a part of the hours "worked" on the job. In the opinion of the Court, time necessarily spent in walking from the plant entrance to the place of work and in doing tasks necessary to starting or stopping work, such as sharpening tools or cleaning the machine or place of work, could be considered work time. On the other hand, time spent in personal activities could not be so counted; similarly, the *de minimis* doctrine, which states that the law is not concerned with trifling matters, could

<sup>13</sup> *Anderson et al. v. Mt. Clemens Pottery Co.*, 328 U. S. 680 (1946).

be applied so that insignificant amounts of walking or preparatory actions could not be held a part of the hours worked.

The case was remanded to the district court of its origin for determination of whether the workers were entitled to any back pay under the rules laid down by the Supreme Court. On a rehearing,<sup>14</sup> the district judge applied the *de minimis* doctrine and held that the amount of preparatory and walking time was too little to warrant compensation. Although the ruling disposed of the one case, it did not establish a principle that would dispose of other similar cases without litigation in each instance.

While the Mt. Clemens case was before the courts, especially after the ruling of the High Court, the idea of getting back pay for travel time and preparatory activities began to take hold in many unions. There was a wave of suits brought into the courts demanding back pay for such time for several years in the past. Since the Fair Labor Standards Act requires that all over forty hours of work per week must be compensated at time-and-a-half, and since most employers were running their plants during the war period more than forty hours per week, the claims ran especially high. The great number of suits and the large amount of the back pay asked caused much sentiment to be aroused against "portal to portal" suits and the actions of unions in general. There is much question as to whether it was reasonable to demand millions of dollars in back pay that might be collected because of a fortunate Supreme Court decision and not because of any dishonesty of the employer. Whether or not it was unreasonable, it was clearly unwise.

Many persons, including many congressmen, felt that the suits for back pay based on claims that pay should have been on a "portal to portal" pay basis rather than on one of time spent at the work place were unjustifiable. Since they were based on a federal law, Congress promptly took steps to put an end to the suits. The action taken is commonly referred to as the Portal Pay Act;<sup>15</sup> the name was not well chosen since Congress covered more than "portal to portal" wage claims.

To prove the need of such legislation, Congress opened the law with a long prefatory statement pointing out the misinterpretation of the Fair Labor Standards Act and the undesirable consequences thereof.<sup>16</sup> Thereupon, the lawmakers turned to the situation at hand; they divided the provisions of the law that dealt with wage

<sup>14</sup> *Anderson v. Mt. Clemens Pottery Co.*, 60 F. Supp. 710 (1947).

<sup>15</sup> Public Law 49; 80th Congress, 1st Session.

<sup>16</sup> The law also applied to wage claims arising under the Walsh-Healy and Davis-Bacon Acts.

claims into two parts applying to claims arising before and after the law went into effect, May 14, 1947.

On claims arising prior to the effective date of the law, no distinction was made between those based on "portal to portal" pay and other wage claims. In both cases, claims were valid only if they were based on the express provision of a contract or on a custom or practice in effect in the place of work of the employer. And if custom or practice was inconsistent with the contract, then the employer did not have to observe the custom. Although most of the wage claims that were instituted before May 14, 1947, were probably portal pay claims, the law was much broader; if workers had no contract and had been paid less than the amount due to them for sufficiently long for such to become a custom or practice, then the law forbade a suit to collect in such cases.

On claims arising after May 14, 1947, much the same general principles were followed. Time spent traveling to and from the place of work or in activities preliminary or postliminary to a person's principal activities was to be compensated only if pay was required by contract, custom, or practice. Since the law does not define "custom" or "practice" or "preliminary" or "postliminary" activities, it is far from clear. In time, a body of administrative doctrine will be built up to clarify the meaning of these words.

In view of the vague language used in the law, it is not clear what its results will be. One thing is clear: it cut the ground from under most "portal to portal" pay suits, since they were not based on custom, practice or contract. Presumably, that was the main purpose of the act. If the law were to be used to discourage payment for extended periods of travel on the employer's property such as are necessary in mining or lumbering, for example, it would be unfortunate. However, such payments are permitted if they have been made customarily or if called for in a contract.

Thus, the Congress took in 1947 its first steps to modify existing federal labor controls. The Labor Management Relations Act and the Portal Pay Act both were actions essentially unfriendly toward organized labor, actions which were probably typical of the general sentiment of most non-worker groups. Strangely enough, although Congress could find time for these pieces of legislation, they could not find the time to consider carefully the enactment of a fair employment practice (non-discriminatory treatment of labor regardless of color or race) law or to raise the forty-cent minimum wage, so obviously inadequate in view of rising prices.

It has been stated previously that impetuous actions on the part of organized labor in some of the work stoppages whose conditions

impeded the national productive effort were unwise from the standpoint of public and congressional opinion; the portal pay suits were equally unfortunate. However, there is a sharp difference between correcting abuses and changing markedly the general tenor of controls and protections previously established. The federal legislation reviewed in this chapter went much further than to correct abuses.

### Questions

1. Many students of labor relations say that a wave of labor disputes was to be expected at the close of World War II. What is your attitude toward this opinion?
2. What are the pros and cons of the banning of closed shop agreements as was done under the Taft-Hartley Law?
3. Do you think there was need in 1947 for a revision of the National Labor Relations Act? If so, what specific revisions do you think were needed?
4. Do you consider union attitudes toward revision of the Wagner Act wise? If not, what would you suggest as a more intelligent approach?
5. The Taft-Hartley Law was aimed, in part at least, at balancing the power of unions and employers. Do you think it has succeeded in doing this?
6. Did the Portal Pay Act of 1946 change the meaning of "work time"? How would you define work time?

## CHAPTER XXVI

### CONCLUSIONS

#### Background of labor controls

It is clear from the foregoing chapters that the American people did not reach the present stage of government control over labor relations at one jump. Rather it has resulted from a century and a half of legislative and judicial decisions and from the examples and precedents set by the British both before and after we became an independent nation. As a result of this extended period of maturation, an understanding of our present government policies requires a knowledge of many developments and practices of the past that have had an influence on the contemporary situation.

However, factors other than the legislative and judicial precedent that has evolved have influenced the structure of controls in our economy. The social and economic conditions of the time do much to shape the thought of our judges and legislators. A severe depression with many millions of unemployed brings a willingness to accept social experimentation. A strongly organized and belligerent labor movement engenders an attitude of opposition to unions. Various factors will exert their influence from time to time; thus, the conditions that give rise to certain actions include the labor problems that are especially knotty and the customs and precedents that exist. These customs and precedents are used as a basis for improvising or developing new means of dealing with problems at hand.

The history of the legislation and court action that comprises the background of our present labor controls is roughly a century and a half old. But even earlier the British had been exerting controls over labor legislation for centuries; the great part of those controls had been unfriendly toward labor, striving to protect the interests of employer groups and to discourage the organization of labor. Although this traditional attitude began to break a little at the end of the first quarter of the nineteenth century, there were by that time adequate examples of means of dealing effectively with unions of workers. As we have seen, America patterned itself readily upon these restrictive precedents.

In the latter part of the nineteenth century Great Britain and other

European nations developed a new line of action to cope with labor problems. In the late nineteenth and early twentieth century the pioneering experiments in social legislation were made. These laws were a significant and constructive development in the search for means of handling the labor and social problems that arose out of modern industrial society. In the United States, however, later industrialization, the slow disappearance of the frontier, and the strong spirit of individualism resulted in a very slow adoption of similar protective measures for American workmen.

When the courts of this nation began to act in cases that concerned the activities of labor they had little in the form of written law for guideposts. Using their own interpretation of the common law—the customs and mores of the people—as guideposts, the courts were almost completely free to act as they saw fit. It has been shown that these actions frequently were unfriendly toward organized labor.

Gradually, statute law was substituted for common law; as such legislation was enacted, there were certain rather elastic limits on its content. The Constitution of the United States, although far from clear and definite on many issues, contains provisions concerning the power of federal and state legislative bodies to enact laws. The great difficulty therein is the lack of adequate and clear-cut definitions of some of the terminology used. The federal Congress has the power to regulate interstate commerce; just exactly when such commerce starts and stops is not readily discernible and is not agreed upon from one time to another by members of the Supreme Court. It is very clear that interstate commerce is now construed much more broadly than it was a relatively few years ago. The power to tax is equally unclear; in many instances a measure levying excises of some form may in part be to raise revenue and in part a regulatory measure. Just how much regulation can be mixed with revenue raising and still be within the bounds of the Constitution is not clear.

Powers neither delegated to Congress nor denied to the states are reserved for the latter; the term "police power" is used to refer to the broad power of the states to regulate in order to promote the general welfare of their citizens. While this term does not appear in the Constitution, it is used to describe the powers reserved to the states. The difficulty involved is, of course, the problem of determining when a certain measure promotes the general welfare. One of the striking characteristics of our society is the great number of conflicts of interests; in such a case, almost any regulation or control benefits some persons and is harmful to others. Arriving at

the proper evaluation of the benefits and detriments caused by some regulations is indeed difficult.

The Constitution also offers protections of some of the more basic rights of the people, such as freedom of speech, press, religion, assembly, and others. However, it should be kept in mind that under the Constitution these are not unconditionally guaranteed; they are highly protected, and no more. It might be said that individuals are given a guarantee that these basic rights will not be taken from them in an arbitrary and unreasonable manner. This is only good sense. There is no reason to be such a slave to freedom as to allow a person to exercise his right of free speech by shouting "Fire!" in a crowded theater or other gathering place. Nor is there any reason to allow a maniac freedom to go where he pleases.

Such denials of freedom as those just referred to obviously are reasonable. However, there are many instances in which the case is not so clear-cut; this is especially true when restrictions that may affect the economic well-being of a person or group are at issue. Here is the area in which judicial decisions, based on rights protected under the Constitution, have often been far out of step with economic reality. To assume that two persons or groups of persons have equal power to exercise their rights freely to contract, regardless of their economic circumstances, is to be far from the truth; unfortunately, such assumptions seem to have been basic to many court decisions and laws noted in the foregoing pages.

The conclusion is inescapable that, with a limited number of exceptions, as our society developed its own structure of legislative and judicial controls to govern labor relations and to solve labor problems, the guiding thought of legislators and members of the judiciary was unfriendly to labor. It is doubtful if the persons involved thought of themselves as being unfriendly toward any group; in fact, it is a rare person who can see and understand his own bias and prejudices. Nevertheless, the background, training, and environment that influenced these persons were such as to produce the point of view that has been noted.

Until the first World War the laws and decisions that evolved probably came about with little or no thought given toward any sort of over-all program. Court actions and, to a lesser extent, laws were improvisations designed to meet especially pressing problems. For as long as it lasted the emergency of the war changed this situation somewhat at the federal level. For the first time, uncertain but stimulating attempts at more comprehensive plans were made. Administrative actions establishing dispute-settling mechanisms and sanctioning the right of workers to organize and the creation of a



system of public employment exchanges were parts of a hurriedly developed labor policy aimed at handling the most pressing labor problems in such a way as to expedite the war effort.

That much of the wartime control program was hastily conceived and administered by any means which could be seized upon did not detract from the fact that here was an attempt to fit together a number of activities comprising—although it was rather limited—a program of action. This was one of the early indications of the fact that it takes an emergency situation to bring about strong, concerted action. The more extreme the emergency and the more widespread the public acceptance of the existence of it, the greater will be the element of control.

The postwar period served to emphasize the fact that public sentiment does much to make or break a program of controls. The disappearance of a wartime psychology with the stoppage of hostilities, long before the economic effects of the war were past, made it impossible to continue some of the programs that had been set up during the war. But as a nation we learned little from the economic disruptions that followed; the same story was repeated a quarter of a century later with almost no deviations from the original pattern of 1918-1920.

The period between the two wars was one of contrasts; the government policies of the 1920's and 1930's were so different that the two decades must be kept in mind as sharply unlike. In the 1920's the postwar psychology already described and the general prosperity of the time made the period one of almost no progress in federal labor controls, and also of little in the states.

Probably postwar psychology and general prosperity were not the only causes of the reaction of the 1920's. There was a widespread psychological attitude that the new capitalism of prosperity based on high wages and enlightened labor policies was here to stay. In the minds of many, the well-being of management and labor lay in the same direction and employers would see to it that the interests of their workers were protected. If such were the case, there was no need for a strongly organized labor force to demand that the workers' interests be protected; similarly, there was no need of enacting protective legislation for labor.

There was still another matter that helped to explain the attitudes of the 1920's. The philosophy of economic individualism was widespread; every person had the right and the opportunity to aspire and strive for high position. According to such a philosophy, each individual should have the right to contract his services under any circumstances that he chose. Thus, minimum-wage laws, for example, were a clear violation of the thought that everyone should

be left free to pursue his own best interests in any way he saw fit. The concept of economic necessity making it impossible for many persons effectively to pursue their own best interests was not commonly held by legislators and the judiciary at that time.

### Changes in government philosophy

The decade of the 1930's was ushered in with an economy-shaking depression, the equal of which had never been seen in this nation. Greater numbers of unemployed had never plagued the nation, and, especially as the depression wore on, never had so much doubt been raised as to the workability of American capitalism.

With such a shocking experience that did not pass away quickly, the Congress was needled into attempting relatively drastic action to cope with the situation. As it happened, this action was taken under a Democratic administration; it is doubtful if the identity of the political party in power was a dominant factor in the nature and extent of the experiments. The economic controls of the "New Deal" probably were more a product of the times than of the party that happened to be in power; although different groups in office would have influenced the details of the recovery program of the federal government, the broad outlines would of necessity have remained substantially the same.

There was another interesting development in the 1930's. The rights and privileges of members of the working classes were recognized and protected much more carefully than they ever had been before. The theory that complete equality of treatment of employer and employee and of the well-to-do and the poor would offer equality of opportunity for all gradually was abandoned. In its place, a philosophy was developed of consciously protecting the weaker and less capable groups in our society; the depression emphasized the fact that the less fortunate and the less able persons were in many instances unable to cope with the economic problems that they faced.

With this new attitude as a basis of action, the 1930's became a period in which much progressive labor and social legislation was enacted. Those laws have been noted in some detail earlier in this book; they need not be reviewed here. Regulations guaranteeing the right of workers to organize and others instituting broad and effective control of wages and child labor and a system of social security legislation were a sharp break with precedent and tradition.

At the same time there was a shift in the position of certain members of the Supreme Court. Some members of that body had taken a liberal position for many years in the past; but in most instances

the opinions of Justices like Brandeis, Holmes, Cardozo, and a few others were minority statements. It was not until the late 1930's that the thinking of Brandeis on the right of workers to organize and on minimum-wage rates and other social protections became acceptable to a Court majority. This was a very important development because a change in the attitude of persons in Congress would have done little good if the High Court had not been willing to validate new and more progressive laws.

During the depression decade the attitude of the national Congress and the Supreme Court was reflected in the states. There as elsewhere a more liberal attitude than had prevailed earlier developed, and steps were taken in a considerable number of states to restrict the use of the injunction so as to ensure the right to organize and to improve child labor or minimum-wage legislation. And, under the impetus of the federal Social Security Act, unemployment compensation and old age assistance laws were enacted in all states.

The outbreak of the second World War brought a period in which labor problems were dealt with by the government in summary fashion. Labor disputes could not be fought out at that time; steadiness of production was much too important to the war effort. Similarly, wages, hours of work, the utilization of labor, and other matters demanded government policies and controls that would ensure the most effective prosecution of the war.

The practices of the government during the war were such as to keep the amount of time lost through work stoppages at a minimum and to make the record of war production extremely high. But it left in the wake of the war many instances in which governmentally imposed settlements of labor-management controversies were far from satisfactory to either party to the dispute. And with the end of the shooting war many persons felt that no holds were barred in the settlement of controversies. As a result, there was a widespread outbreak of strikes in 1946, and these stoppages caused much resentment among the public and the members of Congress.

This attitude led to a dominance of reaction in government policies that, temporarily at least, retraced some of the steps in progressive labor legislation that had been taken so slowly in the previous decade. The reaction was not so severe as union leaders would have had the nation believe; neither state nor federal laws took us back to slave labor nor to the extensive use of labor injunctions and other anti-union weapons that were common in the early 1930's. Despite this fact, the federal and state labor legislation of 1945-1947 showed a rather unfriendly attitude toward organized labor. Under the guise of equalizing the powers and privileges of unions and management, much was done in the federal Labor Management

Relations Act and in similar state laws to weaken the position of organized labor. The relaxing of restrictions on the issuance of labor injunctions and the imposition of curbs on the union shop, the checkoff, political activity, and other union actions placed unions in a much less advantageous position than they had enjoyed after 1935.

There seems to be little doubt but that this was the intent and purpose of the laws. The manner in which some passages of the federal Labor-Management Relations Act were worded was such they could hardly have been drawn by persons who believed that strong labor unions are desirable. With the long tradition of unions within the nation and with the Bill of Rights guaranteed by the Constitution, it was not feasible to try to say that unions were, *per se*, undesirable. But although a law so saying was impractical, it was possible to attack a bit here and there so that the power of unions would be curbed. Such a philosophy must have been basic to much of the postwar labor legislation enacted by state and federal lawmakers.

#### Probable trends in government labor controls

By late 1947, therefore, the United States had shown a considerable swing to reaction; would it continue and should it? It is quite unlikely that the shift will continue for many years. Although under the "New Deal" administration of President F. D. Roosevelt, liberal or progressive legislation may have come about more rapidly than it would have under another administration, the general trend of government controls over labor problems and labor relations was discernible before 1933. The party and persons at the helm of the nation may have influenced the specific contents of the measures enacted, but it probably did not control their general nature.

If the above reasoning be sound, then the future of government labor controls is clear. The legislation and the judicial and administrative attitudes of the future must, in a broad sense, be pro-labor. That is, the fact must be recognized that in the American economy there are strong economic rivalries between management and labor and their points of view frequently will conflict sharply. As these divergent interests are pursued, labor relations frequently come down to a test of strength between the contesting parties. In such cases, in those parts of our economy where relatively large-scale business enterprise exists the bargaining power of employers and unorganized workers is likely to be quite unequal. In order to achieve a relatively adequate balance of power, the government needs to sanction, as it has been doing since 1933, the formation of independent, responsible trade unions. According to the present doctrines of the Supreme Court, union-management disputes are so

clearly related to the free and uninterrupted flow of interstate commerce that such action is within the powers of the federal government.

One of the more disturbing of the phenomena observable in our economy is the increasing amount of economic insecurity that is all about us. The worker is likely to have little with which to care for himself and family during periods of unemployment, sickness, or other hardship. Therefore, the future policy of the government must be to extend and improve the social security measures now in effect. Partially for economic and partially for humanitarian reasons the unemployed worker must be provided a reasonably adequate income in times when he finds it impossible to get work. The same is true of older workers no longer able to earn their own livelihood; they too should receive an adequate income despite their enforced idleness.

It might be noted in passing that the problem of caring for older workers is likely to increase in size and complexity. The proportion of our population that is above sixty or sixty-five years of age has grown steadily. Meanwhile, the productive ability of industrial workers per hour of work is on the increase, but our distribution of purchasing power is such that we seem able only during war and postwar periods to use all that our economy can produce. If this is the case, then the economy is faced with a number of possible actions to meet the situation. One possible means of ensuring that we utilize, whether wisely or unwisely, all we produce is to enter into a continuous or frequently recurring war. The trouble with this possible action is that eventually there might be too few persons left to worry particularly about economic problems. A second approach is a very sharp redistribution of income so as to put a much larger percentage of all income in the hands of the poorer classes. There are many real problems involved in such a proposal, and politically it is a very touchy question at best. Such a plan is not likely to be the one followed, if for no other reason than that it would be political dynamite. A third possibility is cutting deeply into the hours of work. In part through legislation and in part through enlightened personnel practices, this general policy has been followed to the point where hours of work are rarely a problem of physical ability. But the shortening of hours of work to cope with existing or potential unemployment has been followed slightly by the "New Deal" administration and urged by some unions. In view of the fact that unions are rarely willing to take a cut in hours without an increase in wage rates to make up for the shorter work time, this idea may not be carried much further by governmental fiat.

A beginning has been made, through school-attendance laws and the retirement annuities of the Social Security Act, of shortening the number of years during which persons are active members of the labor force. Politically, this may be the most logical method of trying to keep the labor force at a relatively low level. Most persons are in favor of giving children the opportunity for a more extended education than has been possible in the past. And probably most persons do not object to paying social security taxes to be used for retirement benefits, since they expect to be able to draw similar benefits when they reach retirement age.

To the economist who is not primarily interested in matters of political expediency, the problem is one of increasing the demand for goods or otherwise guaranteeing to workers who are not needed in productive jobs an income that is adequate to meet basic needs. In future years the matter of social security will probably loom larger and larger. Since the older workers and the unemployed do not have a right to an income from work performed, but must continue to consume food, clothing, shelter, and the like even though they are not working, it is the duty of government in a civilized society to extend a helping hand.

The position stated in this chapter must not be taken to mean that the duty of government is in all cases to protect working-class groups; in some instances they are more than able to take care of themselves. There are a number of powerful unions in the nation today that have organized virtually the whole craft or industry in which they are active, and their position is such that they are able to match or even override the bargaining strength of some of the employers with whom they negotiate.

It clearly is the duty of government to ensure that neither management nor any union be allowed an uninhibited power to negotiate or otherwise conduct its affairs entirely as it sees fit. A powerful union, just as a powerful employer, can do much that is socially undesirable. In view of this fact, legislation was called for in the post-war period to state the duties of trade unions as well as their rights. In other words, there was a need, and there will continue to be a need if the union movement remains strong and powerful, to state the rights and duties of both management and labor rather than the rights of labor and the duties of management. The opinion has been expressed herein that the Taft-Hartley Act was not the piece of legislation that was needed; that it was more than an attempt to balance the rights and duties of management and labor. But the leaders of labor who took the position that no legislative responsibilities should be placed upon the labor movement showed a lack

of knowledge or a disregard for the very great influence that the actions of powerful unions can have on the public.

Since in a highly integrated economy work stoppages and labor unrest can be severely harmful to the public, some legislation to establish the duty of unions to bargain in good faith and to curb actions that are especially harmful is needed. Such laws would not limit the normal actions of most unions; those whose activities were severely curtailed thereby could not be defended. Perhaps it also is defensible to prohibit the closed shop, but any attempts to restrict the union shop, unless it was secured by fraud or violence, cannot be defended; such restrictions on the union shop as now exist should be repealed.

Perhaps in some instances controls may need to be extended further. There are groups of workers in our society whose work is so important that it should be continued without interruption at almost any cost; persons working in public utilities are an example. Employees of a hospital are another instance, as are many employees of state and local governments. It may be necessary to take from such groups the right to strike; their work is so important to the public welfare that they should not be able to stop it in concert. But such a public policy would be indefensible unless accompanied by an extension of guarantees that would enable such workers to have their grievances and demands handled promptly and justly without resort by them to work stoppages or threats of them. Ensuring prompt and peaceful settlement of grievance issues and consideration of demands would require special governmentally appointed or supervised boards created for this express purpose. Some lessons of experience along this line are now available in the railway labor policy of the government of the years since the early 1920's. Although some settlements are far from prompt, almost all are reached without actual work stoppages.

The general point of view that has been expressed in the preceding paragraphs is essentially a pro-labor one, in the sense that it is held to be generally desirable for labor controls to protect the rights of workers even if by so doing the rights of others are restricted. The reason for taking this point of view is that the lack of any considerable amount of property or savings, which is typical of the average worker, makes him much less able to withstand economic hardship than are most entrepreneurial, professional, and other groups. And, as we have said, economic insecurity is a characteristic of the American economy.

If it be true that there is much discrepancy between the economic power of different groups, then it follows that a governmental policy which treats all alike regardless of their status or circumstances is

not desirable. Inequalities give rise to a need for protective legislation, guaranteeing certain rights, that frankly is based on a philosophy of differential treatment for persons in accordance with varied circumstances. It is only by such methods that we can equalize economic powers and privileges and extend a truly equal opportunity to all. Such plans, if properly and effectively executed, would mean no "second-class" economic citizens, a goal that is in agreement with the basic tenets of the democratic way of life.

### Questions

1. Does your study of government labor controls lead you to believe that they can be enacted and amended with enough speed to make them an adequate method of dealing with labor problems?
2. Should government policy be one of trying to prescribe the solution to a certain labor problem or should it be to try to equalize bargaining power and let labor and management reach their own solutions?
3. To what extent do you think public opinion determines the controls that are established?
4. Is it possible through government controls to do away with the economic insecurities that plague our economy and yet retain our basic individual freedoms?
5. What, in your opinion, are the greatest gaps in the social security legislation existing in the United States? Defend your answer.
6. It has been stated in this chapter that in the future government controls must, in broad outline, favor the worker, whose bargaining power is often too weak to bring about equitable employment conditions. Evaluate this point of view.





## APPENDICES



## Appendix I

### BIBLIOGRAPHY

The books, articles, reports, and court decisions listed in Appendix I will provide material for further study of the subjects discussed in the foregoing pages. There are other sources that may serve as well. There is much material pertinent to government labor controls contained in the Constitution of the United States and in the laws of the land. Since some of these are included in the following appendices, none are cited in the bibliography.

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## APPENDIX II

### CONSTITUTION OF THE UNITED STATES

WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America.

#### ARTICLE I.

SECTION 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

[Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.] The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

SECTION 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and

of the third Class at the Expiration of the sixth Year, so that one-third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

SECTION 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of Chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

SECTION 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

SECTION 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

SECTION 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

SECTION 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

SECTION 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

SECTION 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts,

laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

## ARTICLE II.

SECTION 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice-President, chosen for the same Term, be elected, as follows

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[The Electors shall meet in their respective States, and vote by Ballot for two persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two-thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice-President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice-President.]

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President,

and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

SECTION 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices, and he shall have Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

SECTION 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

SECTION 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

#### ARTICLE III.

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty

and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

SECTION 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained.

#### ARTICLE IV.

SECTION 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

SECTION 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

SECTION 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

SECTION 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.



## ARTICLE V.

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

## ARTICLE VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

## ARTICLE VII.

The Ratification of the Conventions of nine States shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same. DONE in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth. In Witness whereof We have hereunto subscribed our Names.

Go. WASHINGTON  
*Presidt and deputy from Virginia*

*New Hampshire.*

JOHN LANGDON  
NICHOLAS GILMAN

*Massachusetts.*

NATHANIEL GORHAM  
RUFUS KING

*Connecticut.*

WM SAML JOHNSON  
ROGER SHERMAN

*New York.*

ALEXANDER HAMILTON

*New Jersey.*

WIL: LIVINGSTON  
DAVID BREARLEY.  
WM PATTERSON  
JONA: DAYTON

*Pennsylvania.*

B. FRANKLIN  
ROBT. MORRIS  
THOS. FITZSIMONS  
JAMES WILSON  
THOMAS MIFFLIN  
GEO. CLYMER  
JARED INGERSOLL  
GOUV MORRIS

*Delaware.*

GEO: READ  
JOHN DICKINSON  
JACO: BROOM  
GUNNING BEDFORD jun  
RICHARD BASSETT

*Maryland.*

JAMES MCHENRY  
DANL CARROLL  
DAN: of ST THOS JENIFER

*Virginia.*

JOHN BLAIR—  
JAMES MADISON JR.

*North Carolina.*

WM BLOUNT  
HU WILLIAMSON  
RICHD DOBBS SPAIGHT

*South Carolina.*

J. RUTLEDGE  
CHARLES PINCKNEY  
CHARLES COTESWORTH PINCKNEY  
PIERCE BUTLER.

*Georgia.*

WILLIAM FEW  
ABR BALDWIN

Attest:

WILLIAM JACKSON, *Secretary.*

ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION.

## [ARTICLE I.]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

## [ARTICLE II.]

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

## [ARTICLE III.]

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

## [ARTICLE IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## [ARTICLE V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## [ARTICLE VI.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

## [ARTICLE VII.]

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

## [ARTICLE VIII.]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

[ARTICLE IX.]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

[ARTICLE X.]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE XI.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

ARTICLE XII.

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

ARTICLE XIII.

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

## ARTICLE XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

## ARTICLE XV.

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude—

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

## ARTICLE XVI.

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

## ARTICLE XVII.

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall

have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

#### ARTICLE XVIII.

SECTION 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

SECTION 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

#### ARTICLE XIX.

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

#### ARTICLE XX.

SECTION 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

SECTION 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

SECTION 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

SECTION 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

SECTION 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

SECTION 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

ARTICLE XXI.

SECTION 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

SECTION 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

### APPENDIX III

## NATIONAL LABOR RELATIONS ACT

[PUBLIC—No. 198—74TH CONGRESS]

[S. 1958]

AN ACT

To diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce, to create a National Labor Relations Board, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

#### FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization,



and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

SEC. 2. When used in this Act—

(1) The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8.

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(10) The term "National Labor Relations Board" means the National Labor Relations Board created by section 3 of this Act.

(11) The term "old Board" means the National Labor Relations Board established by Executive Order Numbered 6763 of the President on June 29, 1934, pursuant to Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183), and reestablished and continued by Executive Order Num-

bered 7074 of the President of June 15, 1935, pursuant to Title I of the National Industrial Recovery Act (48 Stat. 195) as amended and continued by Senate Joint Resolution 133 approved June 14, 1935.

NATIONAL LABOR RELATIONS BOARD

SEC. 3. (a) There is hereby created a board, to be known as the "National Labor Relations Board" (hereinafter referred to as the "Board"), which shall be composed of three members, who shall be appointed by the President, by and with the advice and consent of the Senate. One of the original members shall be appointed for a term of one year, one for a term of three years, and one for a term of five years, but their successors shall be appointed for terms of five years each, except that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

(b) A vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board, and two members of the Board shall, at all times, constitute a quorum. The Board shall have an official seal which shall be judicially noticed.

(c) The Board shall at the close of each fiscal year make a report in writing to Congress and to the President stating in detail the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees and officers in the employ or under the supervision of the Board, and an account of all moneys it has disbursed.

SEC. 4. (a) Each member of the Board shall receive a salary of \$10,000 a year, shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint, without regard for the provisions of the civil-service laws but subject to the Classification Act of 1923, as amended, an executive secretary, and such attorneys, examiners, and regional directors, and shall appoint such other employees with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as it may from time to time find necessary for the proper performance of its duties and as may be from time to time appropriated for by Congress. The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation (or for statistical work), where such service may be obtained from the Department of Labor.

(b) Upon the appointment of the three original members of the Board and the designation of its chairman, the old Board shall cease to exist. All employees of the old Board shall be transferred to and become employees of the Board with salaries under the Classification Act of 1923, as amended, without acquiring by such transfer a permanent or civil service status. All records, papers, and property of the old Board shall become records, papers, and property of the Board, and all unexpended funds and appropriations for the use and maintenance of the old Board shall become funds and appropriations available to be expended by the Board in the exercise of the powers, authority, and duties conferred on it by this Act.

(c) All of the expenses of the Board, including all necessary traveling and subsistence expenses outside the District of Columbia incurred by the members or employees of the Board under its orders, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the Board or by any individual it designates for that purpose.

SEC. 5. The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case.

SEC. 6. (a) The Board shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act. Such rules and regulations shall be effective upon publication in the manner which the Board shall prescribe.

#### RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

#### REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in

such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

#### PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument.

If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States

upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101-115).

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

#### INVESTIGATORY POWERS

SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. Any member of the Board shall have power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question, before the Board, its member, agent, or agency conducting the hearing or investigation. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In case of contumacy or refusal to obey a subpoena issued to any person,

any District Court of the United States or the United States courts of any Territory or possession, or the Supreme Court of the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(3) No person shall be excused from attending and testifying or from producing books, records, correspondence, documents, or other evidence in obedience to the subpoena of the Board, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

(4) Complaints, orders, and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same. Witnesses summoned before the Board, its member, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(5) All process of any court to which application may be made under this Act may be served in the judicial district wherein the defendant or other person required to be served resides or may be found.

(6) The several departments and agencies of the Government, when directed by the President, shall furnish the Board, upon its request, all records, papers, and information in their possession relating to any matter before the Board.

SEC. 12. Any person who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this Act shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than one year, or both.

#### LIMITATIONS

SEC. 13. Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike.

SEC. 14. Wherever the application of the provisions of section 7 (a) of the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, sec. 707 (a)), as amended from time to time, or of section 77 B, paragraphs (l) and (m) of the Act approved June 7, 1934, entitled "An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States,

approved July 1, 1898, and Acts amendatory thereof and supplementary thereto" (48 Stat. 922, pars. (1) and (m), as amended from time to time, or of Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183)), conflicts with the application of the provisions of this Act, this Act shall prevail: *Provided*, That in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect.

SEC. 15. If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

SEC. 16. This Act may be cited as the "National Labor Relations Act."

Approved, July 5, 1935.



APPENDIX IV

LABOR MANAGEMENT RELATIONS ACT  
OF 1947

[PUBLIC LAW 101—80TH CONGRESS]

[CHAPTER 120—1ST SESSION]

[H. R. 3020]

AN ACT

To amend the National Labor Relations Act, to provide additional facilities for the mediation of labor disputes affecting commerce, to equalize legal responsibilities of labor organizations and employers, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

SHORT TITLE AND DECLARATION OF POLICY

SECTION 1. (a) This Act may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and prescribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

TITLE I—AMENDMENT OF NATIONAL LABOR RELATIONS ACT

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

"FINDINGS AND POLICIES

"SECTION 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing com-

merce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

"The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

"Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

"Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

#### "DEFINITIONS

"SEC. 2. When used in this Act—

"(1) The term 'person' includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

"(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

"(3) The term 'employee' shall include any employee, and shall not be

limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

"(4) The term 'representatives' includes any individual or labor organization.

"(5) The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

"(8) The term 'unfair labor practice' means any unfair labor practice listed in section 8.

"(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

"(10) The term 'National Labor Relations Board' means the National Labor Relations Board provided for in section 3 of this Act.

"(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

"(12) The term 'professional employee' means—

"(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or

learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

"(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

"(13) In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

#### "NATIONAL LABOR RELATIONS BOARD

"SEC. 3. (a) The National Labor Relations Board (hereinafter called the 'Board') created by this Act prior to its amendment by the Labor Management Relations Act, 1947, is hereby continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate. Of the two additional members so provided for, one shall be appointed for a term of five years and the other for a term of two years. Their successors, and the successors of the other members, shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

"(b) The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

"(c) The Board shall at the close of each fiscal year make a report in writing to Congress and to the President stating in detail the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees and officers in the employ or under the supervision of the Board, and an account of all moneys it has disbursed.

"(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

"SEC. 4. (a) Each member of the Board and the General Counsel of the

Board shall receive a salary of \$12,000 a year, shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint an executive secretary, and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties. The Board may not employ any attorneys for the purpose of reviewing transcripts of hearing or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts. No trial examiner's report shall be reviewed, either before or after its publication, by any person other than a member of the Board or his legal assistant, and no trial examiner shall advise or consult with the Board with respect to exceptions taken to his findings, rulings, or recommendations. The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, or for economic analysis.

"(b) All of the expenses of the Board, including all necessary traveling and subsistence expenses outside the District of Columbia incurred by the members or employees of the Board under its orders, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the Board or by any individual it designates for that purpose.

"Sec. 5. The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case.

"Sec. 6. The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act.

#### "RIGHTS OF EMPLOYEES

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

#### "UNFAIR LABOR PRACTICES

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to

section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

"(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

"(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a);

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease

doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided*, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

"(5) to require of employees covered by an agreement authorized under subsection (a) (3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected; and

"(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed.

"(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

"(3) notifies the Federal Mediation and Conciliation Service within thirty

days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

"(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

#### "REPRESENTATIVES AND ELECTIONS

"SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

"(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with



an organization which admits to membership, employees other than guards.

“(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

“(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

“(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

“(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10 (c).

“(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

“(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

“(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

“(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

“(e) (1) Upon the filing with the Board by a labor organization, which is the representative of employees as provided in section 9 (a), of a petition alleging that 30 per centum or more of the employees within a unit claimed to be

appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.

"(2) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3) (ii), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit, and shall certify the results thereof to such labor organization and to the employer.

"(3) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

"(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

"(1) the name of such labor organization and the address of its principal place of business;

"(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded \$5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

"(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

"(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

"(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

"(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor; and (B) can show that prior thereto it has—

"(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

"(2) furnished to all of the members of such labor organization copies of

the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

"(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9 (e) (1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

"(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

#### "PREVENTION OF UNFAIR LABOR PRACTICES

"SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved

thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

"(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

"(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

"(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdic-

tion to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

"(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

"(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order on the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes', approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101-115).

"(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

"(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

"(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8 (b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

"(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8 (b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law:

*Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8 (b) (4) (D).

#### "INVESTIGATORY POWERS

"SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

"(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

"(2) In case of contumacy or refusal to obey a subpoena issued to any person, any district court of the United States or the United States courts of any Territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

"(3) No person shall be excused from attending and testifying or from

producing books, records, correspondence, documents, or other evidence in obedience to the subpoena of the Board, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

"(4) Complaints, orders, and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same. Witnesses summoned before the Board, its member, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

"(5) All process of any court to which application may be made under this Act may be served in the judicial district wherein the defendant or other person required to be served resides or may be found.

"(6) The several departments and agencies of the Government, when directed by the President, shall furnish the Board, upon its request, all records, papers, and information in their possession relating to any matter before the Board.

"SEC. 12. Any person who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this Act shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than one year, or both.

#### "LIMITATIONS

"SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

"SEC. 14. (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

"(b) Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

"SEC. 15. Wherever the application of the provisions of section 272 of chapter 10 of the Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States', approved July 1, 1898, and Acts amendatory thereof and supplementary thereto (U. S. C., title 11, sec. 672), conflicts with the application of the provisions of this Act, this Act shall prevail: *Provided*, That in any situation where the provisions of this Act cannot be validly



enforced, the provisions of such other Acts shall remain in full force and effect.

"SEC. 16. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

"SEC. 17. This Act may be cited as the 'National Labor Relations Act'."

#### EFFECTIVE DATE OF CERTAIN CHANGES

SEC. 102. No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act which did not constitute an unfair labor practice prior thereto, and the provisions of section 8 (a) (3) and section 8 (b) (2) of the National Labor Relations Act as amended by this title shall not make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into prior to the date of the enactment of this Act, or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under section 8 (3) of the National Labor Relations Act prior to the effective date of this title, unless such agreement was renewed or extended subsequent thereto.

SEC. 103. No provisions of this title shall affect any certification of representatives or any determination as to the appropriate collective-bargaining unit, which was made under section 9 of the National Labor Relations Act prior to the effective date of this title until one year after the date of such certification or if, in respect of any such certification, a collective-bargaining contract was entered into prior to the effective date of this title, until the end of the contract period or until one year after such date, whichever first occurs.

SEC. 104. The amendments made by this title shall take effect sixty days after the date of the enactment of this Act, except that the authority of the President to appoint certain officers conferred upon him by section 3 of the National Labor Relations Act as amended by this title may be exercised forthwith.

#### TITLE II—CONCILIATION OF LABOR DISPUTES IN INDUSTRIES AFFECTING COMMERCE; NATIONAL EMERGENCIES

SEC. 201. That it is the policy of the United States that—

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees;

(b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes; and

(c) certain controversies which arise between parties to collective-bargain-

ing agreements may be avoided or minimized by making available full and adequate governmental facilities for furnishing assistance to employers and the representatives of their employees in formulating for inclusion within such agreements provision for adequate notice of any proposed changes in the terms of such agreements, for the final adjustment of grievances or questions regarding the application or interpretation of such agreements, and other provisions designed to prevent the subsequent arising of such controversies.

Sec. 202. (a) There is hereby created an independent agency to be known as the Federal Mediation and Conciliation Service (herein referred to as the "Service", except that for sixty days after the date of the enactment of this Act such term shall refer to the Conciliation Service of the Department of Labor). The Service shall be under the direction of a Federal Mediation and Conciliation Director (hereinafter referred to as the "Director"), who shall be appointed by the President by and with the advice and consent of the Senate. The Director shall receive compensation at the rate of \$12,000 per annum. The Director shall not engage in any other business, vocation, or employment.

(b) The Director is authorized, subject to the civil-service laws, to appoint such clerical and other personnel as may be necessary for the execution of the functions of the Service, and shall fix their compensation in accordance with the Classification Act of 1923, as amended, and may, without regard to the provisions of the civil-service laws and the Classification Act of 1923, as amended, appoint and fix the compensation of such conciliators and mediators as may be necessary to carry out the functions of the Service. The Director is authorized to make such expenditures for supplies, facilities, and services as he deems necessary. Such expenditures shall be allowed and paid upon presentation of itemized vouchers therefor approved by the Director or by any employee designated by him for that purpose.

(c) The principal office of the Service shall be in the District of Columbia, but the Director may establish regional offices convenient to localities in which labor controversies are likely to arise. The Director may by order, subject to revocation at any time, delegate any authority and discretion conferred upon him by this Act to any regional director, or other officer or employee of the Service. The Director may establish suitable procedures for cooperation with State and local mediation agencies. The Director shall make an annual report in writing to Congress at the end of the fiscal year.

(d) All mediation and conciliation functions of the Secretary of Labor or the United States Conciliation Service under section 8 of the Act entitled "An Act to create a Department of Labor", approved March 4, 1913 (U. S. C., title 29, sec. 51), and all functions of the United States Conciliation Service under any other law are hereby transferred to the Federal Mediation and Conciliation Service, together with the personnel and records of the United States Conciliation Service. Such transfer shall take effect upon the sixtieth day after the date of enactment of this Act. Such transfer shall not affect any proceedings pending before the United States Conciliation Service or any certification, order, rule, or regulation theretofore made by it or by the Secretary of Labor. The Director and the Service shall not be subject in any way to the jurisdiction or authority of the Secretary of Labor or any official or division of the Department of Labor.

#### FUNCTIONS OF THE SERVICE

Sec. 203. (a) It shall be the duty of the Service, in order to prevent or minimize interruptions of the free flow of commerce growing out of labor dis-

putes, to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation.

(b) The Service may proffer its services in any labor dispute in any industry affecting commerce, either upon its own motion or upon the request of one or more of the parties to the dispute, whenever in its judgment such dispute threatens to cause a substantial interruption of commerce. The Director and the Service are directed to avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation services are available to the parties. Whenever the Service does proffer its services in any dispute, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

(c) If the Director is not able to bring the parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lock-out, or other coercion, including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot. The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this Act.

(d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

SEC. 204. (a) In order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, employers and employees and their representatives, in any industry affecting commerce, shall—

(1) exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions, including provision for adequate notice of any proposed change in the terms of such agreements;

(2) whenever a dispute arises over the terms or application of a collective-bargaining agreement and a conference is requested by a party or prospective party thereto, arrange promptly for such a conference to be held and endeavor in such conference to settle such dispute expeditiously; and

(3) in case such dispute is not settled by conference, participate fully and promptly in such meetings as may be undertaken by the Service under this Act for the purpose of aiding in a settlement of the dispute.

SEC. 205. (a) There is hereby created a National Labor-Management Panel which shall be composed of twelve members appointed by the President, six of whom shall be selected from among persons outstanding in the field of management and six of whom shall be selected from among persons outstanding in the field of labor. Each member shall hold office for a term of three years, except that any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term, and the terms of office of the members first taking office shall expire, as designated by the President at the time of appointment, four at the end of the first year, four at the end of the second year, and four at the end of the third year after the date of appointment. Members of the panel, when serving on business of the panel, shall be paid compensation at the rate of \$25 per day, and shall also be entitled to receive an allowance for

actual and necessary travel and subsistence expenses while so serving away from their places of residence.

(b) It shall be the duty of the panel, at the request of the Director, to advise in the avoidance of industrial controversies and the manner in which mediation and voluntary adjustment shall be administered, particularly with reference to controversies affecting the general welfare of the country.

#### NATIONAL EMERGENCIES

SEC. 206. Whenever in the opinion of the President of the United States, a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe. Such report shall include a statement of the facts with respect to the dispute, including each party's statement of its position but shall not contain any recommendations. The President shall file a copy of such report with the Service and shall make its contents available to the public.

SEC. 207. (a) A board of inquiry shall be composed of a chairman and such other members as the President shall determine, and shall have power to sit and act in any place within the United States and to conduct such hearings either in public or in private, as it may deem necessary or proper, to ascertain the facts with respect to the causes and circumstances of the dispute.

(b) Members of a board of inquiry shall receive compensation at the rate of \$50 for each day actually spent by them in the work of the board, together with necessary travel and subsistence expenses.

(c) For the purpose of any hearing or inquiry conducted by any board appointed under this title, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C. 19, title 15, secs. 49 and 50, as amended), are hereby made applicable to the powers and duties of such board.

SEC. 208. (a) Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out—

(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate.

(b) In any case, the provisions of the Act of March 23, 1932, entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", shall not be applicable.

(c) The order or orders of the court shall be subject to review by the appropriate circuit court of appeals and by the Supreme Court upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code,

as amended (U. S. C., title 29, secs. 346 and 347).

SEC. 209. (a) Whenever a district court has issued an order under section 208 enjoining acts or practices which imperil or threaten to imperil the national health or safety, it shall be the duty of the parties to the labor dispute giving rise to such order to make every effort to adjust and settle their differences, with the assistance of the Service created by this Act. Neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service.

(b) Upon the issuance of such order, the President shall reconvene the board of inquiry which has previously reported with respect to the dispute. At the end of a sixty-day period (unless the dispute has been settled by that time), the board of inquiry shall report to the President the current position of the parties and the efforts which have been made for settlement, and shall include a statement by each party of its position and a statement of the employer's last offer of settlement. The President shall make such report available to the public. The National Labor Relations Board, within the succeeding fifteen days, shall take a secret ballot of the employees of each employer involved in the dispute on the question of whether they wish to accept the final offer of settlement made by their employer as stated by him and shall certify the results thereof to the Attorney General within five days thereafter.

SEC. 210. Upon the certification of the results of such ballot or upon a settlement being reached, whichever happens sooner, the Attorney General shall move the court to discharge the injunction, which motion shall then be granted and the injunction discharged. When such motion is granted, the President shall submit to the Congress a full and comprehensive report of the proceedings, including the findings of the board of inquiry and the ballot taken by the National Labor Relations Board, together with such recommendations as he may see fit to make for consideration and appropriate action.

#### COMPILATION OF COLLECTIVE BARGAINING AGREEMENTS, ETC.

SEC. 211. (a) For the guidance and information of interested representatives of employers, employees, and the general public, the Bureau of Labor Statistics of the Department of Labor shall maintain a file of copies of all available collective bargaining agreements and other available agreements and actions thereunder settling or adjusting labor disputes. Such file shall be open to inspection under appropriate conditions prescribed by the Secretary of Labor, except that no specific information submitted in confidence shall be disclosed.

(b) The Bureau of Labor Statistics in the Department of Labor is authorized to furnish upon request of the Service, or employers, employees, or their representatives, all available data and factual information which may aid in the settlement of any labor dispute, except that no specific information submitted in confidence shall be disclosed.

#### EXEMPTION OF RAILWAY LABOR ACT

SEC. 212. The provisions of this title shall not be applicable with respect to any matter which is subject to the provisions of the Railway Labor Act, as amended from time to time.

### TITLE III

#### SUITS BY AND AGAINST LABOR ORGANIZATIONS

SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce

as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

#### RESTRICTIONS ON PAYMENTS TO EMPLOYEE REPRESENTATIVES

SEC. 302. (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

(c) The provisions of this section shall not be applicable (1) with respect to any money or other thing of value payable by an employer to any representative who is an employee or former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; or (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of

the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities.

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than \$10,000 or to imprisonment for not more than one year, or both.

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 17 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., title 28, sec. 381), to restrain violations of this section, without regard to the provisions of sections 6 and 20 of such Act of October 15, 1914, as amended (U. S. C., title 15, sec. 17, and title 29, sec. 52), and the provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", approved March 23, 1932 (U. S. C., title 29, secs. 101-115).

(f) This section shall not apply to any contract in force on the date of enactment of this Act, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Compliance with the restrictions contained in subsection (c) (5) (B) upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c) (5) (A) be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

## BOYCOTTS AND OTHER UNLAWFUL COMBINATIONS

SEC. 303. (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.

(b) Whoever shall be injured in his business or property by reason or any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

## RESTRICTION ON POLITICAL CONTRIBUTIONS

SEC. 304. Section 313 of the Federal Corrupt Practices Act, 1925 (U. S. C., 1940 edition, title 2, sec. 251; Supp. V, title 50, App., sec. 1509), as amended, is amended to read as follows:

"SEC. 313. It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to



select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section. Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than \$5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, in violation of this section shall be fined not more than \$1,000 or imprisoned for not more than one year, or both. For the purposes of this section 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

#### STRIKES BY GOVERNMENT EMPLOYEES

Sec. 305. It shall be unlawful for any individual employed by the United States or any agency thereof including wholly owned Government corporations to participate in any strike. Any individual employed by the United States or by any such agency who strikes shall be discharged immediately from his employment, and shall forfeit his civil service status, if any, and shall not be eligible for reemployment for three years by the United States or any such agency.

#### TITLE IV

##### CREATION OF JOINT COMMITTEE TO STUDY AND REPORT ON BASIC PROBLEMS AFFECTING FRIENDLY LABOR RELATIONS AND PRODUCTIVITY

Sec. 401. There is hereby established a joint congressional committee to be known as the Joint Committee on Labor-Management Relations (hereafter referred to as the committee), and to be composed of seven Members of the Senate Committee on Labor and Public Welfare, to be appointed by the President pro tempore of the Senate, and seven Members of the House of Representatives Committee on Education and Labor, to be appointed by the Speaker of the House of Representatives. A vacancy in membership of the committee shall not affect the powers of the remaining members to execute the functions of the committee, and shall be filled in the same manner as the original selection. The committee shall select a chairman and a vice chairman from among its members.

Sec. 402. The committee, acting as a whole or by subcommittee, shall conduct a thorough study and investigation of the entire field of labor-management relations, including but not limited to—

(1) the means by which permanent friendly cooperation between employers and employees and stability of labor relations may be secured throughout the United States;

(2) the means by which the individual employee may achieve a greater productivity and higher wages, including plans for guaranteed annual wages, incentive profit-sharing and bonus systems;

(3) the internal organization and administration of labor unions, with special attention to the impact on individuals of collective agreements requiring membership in unions as a condition of employment;

(4) the labor relations policies and practices of employers and associations of employers;

(5) the desirability of welfare funds for the benefit of employees and their relation to the social-security system;

(6) the methods and procedures for best carrying out the collective-bargaining processes, with special attention to the effects of industry-wide or regional bargaining upon the national economy;

(7) the administration and operation of existing Federal laws relating to labor relations; and

(8) such other problems and subjects in the field of labor-management relations as the committee deems appropriate.

SEC. 403. The committee shall report to the Senate and the House of Representatives not later than March 15, 1948, the results of its study and investigation, together with such recommendations as to necessary legislation and such other recommendations as it may deem advisable, and shall make its final report not later than January 2, 1949.

SEC. 404. The committee shall have the power, without regard to the civil-service laws and the Classification Act of 1923, as amended, to employ and fix the compensation of such officers, experts, and employees as it deems necessary for the performance of its duties, including consultants who shall receive compensation at a rate not to exceed \$35 for each day actually spent by them in the work of the committee, together with their necessary travel and subsistence expenses. The committee is further authorized, with the consent of the head of the department or agency concerned, to utilize the services, information, facilities, and personnel of all agencies in the executive branch of the Government and may request the governments of the several States, representatives of business, industry, finance, and labor, and such other persons, agencies, organizations, and instrumentalities as it deems appropriate to attend its hearings and to give and present information, advice, and recommendations.

SEC. 405. The committee, or any subcommittee thereof, is authorized to hold such hearings; to sit and act at such times and places during the sessions, recesses, and adjourned periods of the Eightieth Congress; to require by subpoena or otherwise the attendance of such witnesses and the production of such books, papers, and documents; to administer oaths; to take such testimony; to have such printing and binding done; and to make such expenditures within the amount appropriated therefor; as it deems advisable. The cost of stenographic services in reporting such hearings shall not be in excess of 25 cents per one hundred words. Subpenas shall be issued under the signature of the chairman or vice chairman of the committee and shall be served by any person designated by them.

SEC. 406. The members of the committee shall be reimbursed for travel, subsistence, and other necessary expenses incurred by them in the performance of the duties vested in the committee, other than expenses in connection with meetings of the committee held in the District of Columbia during such times as the Congress is in session.

SEC. 407. There is hereby authorized to be appropriated the sum of \$150,000, or so much thereof as may be necessary, to carry out the provisions of this title, to be disbursed by the Secretary of the Senate on vouchers signed by the chairman.

## TITLE V

### DEFINITIONS

SEC. 501. When used in this Act—

(1) The term "industry affecting commerce" means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce.

(2) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees.

(3) The terms "commerce", "labor disputes", "employer", "employee", "labor organization", "representative", "person", and "supervisor" shall have the same meaning as when used in the National Labor Relations Act as amended by this Act.

#### SAVING PROVISION

SEC. 502. Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act.

#### SEPARABILITY

SEC. 503. If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

JOSEPH W. MARTIN, Jr.

*Speaker of the House of Representatives.*

A. H. VANDENBERG

*President of the Senate pro tempore.*

IN THE HOUSE OF REPRESENTATIVES, U. S.,

*June 20, 1947.*

The House of Representatives having proceeded to reconsider the bill (H. R. 3020) entitled "An Act to amend the National Labor Relations Act, to provide additional facilities for the mediation of labor disputes affecting commerce, to equalize legal responsibilities of labor organizations and employers, and for other purposes", returned by the President of the United States with his objections, to the House of Representatives, in which it originated, it was

*Resolved*, That the said bill pass, two-thirds of the House of Representatives agreeing to pass the same.

Attest:

JOHN ANDREWS

*Clerk.*

I certify that this Act originated in the House of Representatives.

JOHN ANDREWS

*Clerk.*

IN THE SENATE OF THE UNITED STATES,

*June 23 (legislative day, April 21), 1947.*

The Senate having proceeded to reconsider the bill (H. R. 3020) "An Act to amend the National Labor Relations Act, to provide additional facilities for the mediation of labor disputes affecting commerce, to equalize legal respon-

sibilities of labor organizations and employers, and for other purposes", returned by the President of the United States with his objections, to the House of Representatives, in which it originated, and passed by the House of Representatives on reconsideration of the same, it was

*Resolved*, That the said bill pass, two-thirds of the Senate having voted in the affirmative.

Attest:

CARL A. LOEFFLER

*Secretary.*

## APPENDIX V

### FAIR LABOR STANDARDS ACT

[PUBLIC—No. 718—75TH CONGRESS]

[CHAPTER 676—3D SESSION]

[S. 2475]

AN ACT

To provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That this Act may be cited as the "Fair Labor Standards Act of 1938".

#### FINDING AND DECLARATION OF POLICY

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

#### DEFINITIONS

SEC. 3. As used in this Act—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor or-

ganization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Chief of the Children's Bureau in the Department of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Chief of the Children's Bureau certifying that such person is above the oppressive child-labor age. The Chief of the Children's Bureau shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Chief of the Children's Bureau determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with

board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees.

#### ADMINISTRATOR

SEC. 4. (a) There is hereby created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division (in this Act referred to as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of \$10,000 a year.

(b) The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary to carry out his functions and duties under this Act and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may establish and utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General. In the appointment, selection, classification, and promotion of officers and employees of the Administrator, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(c) The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place.

(d) The Administrator shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this Act as he may find advisable.

#### INDUSTRY COMMITTEES

SEC. 5. (a) The Administrator shall as soon as practicable appoint an industry committee for each industry engaged in commerce or in the production of goods for commerce.

(b) An industry committee shall be appointed by the Administrator without regard to any other provisions of law regarding the appointment and compensation of employees of the United States. It shall include a number of disinterested persons representing the public, one of whom the Administrator shall designate as chairman, a like number of persons representing employees in the industry, and a like number representing employers in the industry. In the appointment of the persons representing each group, the Administrator shall give due regard to the geographical regions in which the industry is carried on.

(c) Two-thirds of the members of an industry committee shall constitute a quorum, and the decision of the committee shall require a vote of not less than a majority of all its members. Members of an industry committee shall receive as compensation for their services a reasonable per diem, which the Administrator shall by rules and regulations prescribe, for each day actually spent in the work of the committee, and shall in addition be reimbursed for their necessary traveling and other expenses. The Administrator shall furnish the committee with adequate legal, stenographic, clerical, and other assistance, and shall by rules and regulations prescribe the procedure to be followed by the committee.

(d) The Administrator shall submit to an industry committee from time to time such data as he may have available on the matters referred to it, and shall cause to be brought before it in connection with such matters any witnesses whom he deems material. An industry committee may summon other witnesses or call upon the Administrator to furnish additional information to aid it in its deliberations.

(e) No industry committee appointed under subsection (a) of this section shall have any power to recommend the minimum rate or rates of wages to be paid under section 6 to any employees in Puerto Rico or in the Virgin Islands. Notwithstanding any other provision of this Act, the Administrator may appoint a special industry committee to recommend the minimum rate or rates of wages to be paid under section 6 to all employees in Puerto Rico or the Virgin Islands, or in Puerto Rico and the Virgin Islands, engaged in commerce or in the production of goods for commerce, or the Administrator may appoint separate industry committees to recommend the minimum rate or rates of wages to be paid under section 6 to employees therein engaged in commerce or in the production of goods for commerce in particular industries. An industry committee appointed under this subsection shall be composed of residents of such island or islands where the employees with respect to whom such committee was appointed are employed and residents of the United States outside of Puerto Rico and the Virgin Islands. In determining the minimum rate or rates of wages to be paid, and in determining classifications, such industry committees and the Administrator shall be subject to the provisions of section 8 and no such committee shall recommend, nor shall the Administrator approve, a minimum wage rate which will give any industry in Puerto Rico or in the Virgin Islands a competitive advantage over any industry in the United States outside of Puerto Rico and the Virgin Islands.

No wage orders issued by the Administrator pursuant to the recommendations of an industry committee made prior to the enactment of this joint resolution pursuant to section 8 of the Fair Labor Standards Act of 1938 shall after such enactment be applicable with respect to any employees engaged in commerce or in the production of goods for commerce in Puerto Rico or the Virgin Islands.<sup>1</sup>

#### MINIMUM WAGES

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, whichever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8,

(5) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if

<sup>1</sup> Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).



no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers.<sup>1</sup>

(b) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

(c) The provisions of paragraphs (1), (2), and (3) of subsection (a) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands engaged in commerce or in the production of goods for commerce only for so long as and insofar as such employee is covered by a wage order issued by the Administrator pursuant to the recommendations of a special industry committee appointed pursuant to section 5 (e).<sup>1</sup>

#### MAXIMUM HOURS

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand hours during any period of twenty-six consecutive weeks,

(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees cer-

<sup>1</sup> Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

tified as bona fide by the National Labor Relations Board, which provides that the employee shall not be employed more than two thousand hours during any period of fifty-two consecutive weeks, or

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature,

and if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c) In the case of an employer engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar beet molasses, sugar-cane, or maple sap, into sugar (but not refined sugar) or into syrup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

(d) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

#### WAGE ORDERS

SEC. 8. (a) With a view to carrying out the policy of this Act by reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce, the Administrator shall from time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 6 by employers engaged in commerce or in the production of goods for commerce in such industry or classifications therein.

(b) Upon the convening of an industry committee, the Administrator shall refer to it the question of the minimum wage rate or rates to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof, may hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this Act. The committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry.

(c) The industry committee for any industry shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of 40 cents an hour) which (1) will not sub-

stantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage rates for such classifications, no classification shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee and the Administrator shall consider among other relevant factors the following:

(1) competitive conditions as affected by transportation, living, and production costs;

(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry.

No classification shall be made under this section on the basis of age or sex.

(d) The industry committee shall file with the Administrator a report containing its recommendations with respect to the matters referred to it. Upon the filing of such report, the Administrator, after due notice to interested persons, and giving them an opportunity to be heard, shall by order approve and carry into effect the recommendations contained in such report, if he finds that the recommendations are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the industry committee, will carry out the purposes of this section; otherwise he shall disapprove such recommendations. If the Administrator disapproves such recommendations, he shall again refer the matter to such committee, or to another industry committee for such industry (which he may appoint for such purpose), for further consideration and recommendations.

(e) No order issued under this section with respect to any industry prior to the expiration of seven years from the effective date of section 6 shall remain in effect after such expiration, and no order shall be issued under this section with respect to any industry on or after such expiration, unless the industry committee by a preponderance of the evidence before it recommends, and the Administrator by a preponderance of the evidence adduced at the hearing finds, that the continued effectiveness or the issuance of the order, as the case may be, is necessary in order to prevent substantial curtailment of employment in the industry.

(f) Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein. No such order shall take effect until after due notice is given of the issuance thereof by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give to interested persons general notice of such issuance.

(g) Due notice of any hearing provided for in this section shall be given by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give general notice to interested persons.

## ATTENDANCE OF WITNESSES

SEC. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees.

## COURT REVIEW

SEC. 10. (a) Any person aggrieved by an order of the Administrator issued under section 8 may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Administrator be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon the Administrator, and thereupon the Administrator shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part, so far as it is applicable to the petitioner. The review by the court shall be limited to questions of law, and findings of fact by the Administrator when supported by substantial evidence shall be conclusive. No objection to the order of the Administrator shall be considered by the court unless such objection shall have been urged before the Administrator or unless there were reasonable grounds for failure so to do. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence may materially affect the result of the proceeding and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence to be taken before the Administrator and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Administrator may modify his findings by reason of the additional evidence so taken, and shall file with the court such modified or new findings which if supported by substantial evidence shall be conclusive, and shall also file his recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Administrator's order. The court shall not grant any stay of the order unless the person complaining of such order shall file in court an undertaking with a surety or sureties satisfactory to the court for the payment to the employees affected by the order, in the event such order is affirmed, of the amount by which the compensation such employees are entitled to receive under the order exceeds the compensation they actually receive while such stay is in effect.

## INVESTIGATIONS, INSPECTIONS, AND RECORDS

SEC. 11. (a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act.

(b) With the consent and cooperation of State agencies charged with the administration of State labor laws, the Administrator and the Chief of the Children's Bureau may, for the purpose of carrying out their respective functions and duties under this Act, utilize the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

## CHILD LABOR PROVISIONS

SEC. 12. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, no producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed: *Provided*, That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

(b) The Chief of the Children's Bureau in the Department of Labor, or any of his authorized representatives, shall make all investigations and inspections under section 11 (a) with respect to the employment of minors, and, subject to the direction and control of the Attorney General, shall bring all actions under section 17 to enjoin any act or practice which is unlawful by reason of the existence of oppressive child labor, and shall administer all other provisions of this Act relating to oppressive child labor.

## EXEMPTIONS

SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman

(as such terms are defined and delimited by regulations of the Administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; or (3) any employee employed as a seaman; or (4) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act; or (5) any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products or byproducts thereof; or (6) any employee employed in agriculture; or (7) any employee to the extent that such employee is exempted by regulations or orders of the Administrator issued under section 14; or (8) any employee employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed and published; or (9) any employee of a street, suburban, or interurban electric railway, or local trolley or motor bus carrier, not included in other exemptions contained in this section; or (10) to any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; or (11) any switchboard operator employed in a public telephone exchange which has less than five hundred stations.<sup>1</sup>

(b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; or (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act.

(c) The provisions of section 12 relating to child labor shall not apply with respect to any employee employed in agriculture while not legally required to attend school, or to any child employed as an actor in motion pictures or theatrical productions.

#### LEARNERS, APPRENTICES, AND HANDICAPPED WORKERS

SEC. 14. The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the employment of learners, of apprentices, and of messengers employed exclusively in delivering letters and messages, under special certificates issued pursuant to regulations of the Administrator, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Administrator shall prescribe, and (2) the employment of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, under special certificates issued by the Administrator, at such wages lower than the minimum wage applicable under section 6 and for such period as shall be fixed in such certificates.

<sup>1</sup> Amendment provided by Act of August 9, 1939 (Public No. 344, 76th Congress. 53 Stat. 1266).

## PROHIBITED ACTS

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

(4) to violate any of the provisions of section 12;

(5) to violate any of the provisions of section 11 (c), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

(b) For the purposes of subsection (a) (1) proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

## PENALTIES

SEC. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than \$10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

## INJUNCTION PROCEEDINGS

SEC. 17. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and

subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., 1934 edition, title 28, sec. 381), to restrain violations of section 15.

#### RELATION TO OTHER LAWS

SEC. 18. No provision of this Act or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act, and no provision of this Act relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this Act. No provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act.

#### SEPARABILITY OF PROVISIONS

SEC. 19. If any provision of this Act or the application of such provision to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Approved, June 25, 1938.

[PUBLIC—No. 344—76TH CONGRESS]

[CHAPTER 605—1ST SESSION]

[S. 1234]

AN ACT

To amend section 13 (a) of the Act approved June 25, 1938 (52 Stat. 1069), entitled "Fair Labor Standards Act of 1938".

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 13 (a) of the Act approved June 25, 1938 (52 Stat. 1069), entitled the "Fair Labor Standards Act of 1938", be, and the same is hereby, amended by adding a new subsection 11 as follows: "or (11) any switchboard operator employed in a public telephone exchange which has less than five hundred stations".

Approved, August 9, 1939.



[PUBLIC LAW 283—77TH CONGRESS]

[CHAPTER 461—1ST SESSION]

[S. 1713]

AN ACT

To amend Public Law Numbered 718, Seventy-fifth Congress, approved June 25, 1938.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That paragraph (2) of subsection (b) of section 7 of Public Law Numbered 718, Seventy-fifth Congress, approved June 25, 1938, is hereby amended to read as follows:

"(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall not be employed more than two thousand and eighty hours during any period of fifty-two consecutive weeks, or".

Approved, October 29, 1941.

(Extract from)

[PUBLIC RESOLUTION—No. 88—76TH CONGRESS]

[CHAPTER 432—3D SESSION]

[H. J. Res. 544]

JOINT RESOLUTION

Making appropriations for work relief and relief, for the fiscal year ending June 30, 1941.

(c) That section 5 of the Fair Labor Standards Act of 1938 is amended by adding at the end thereof the following:

"(e) No industry committee appointed under subsection (a) of this section shall have any power to recommend the minimum rate or rates of wages to be paid under section 6 to any employees in Puerto Rico or in the Virgin Islands. Notwithstanding any other provisions of this Act, the Administrator may appoint a special industry committee to recommend the minimum rate or rates of wages to be paid under section 6 to all employees in Puerto Rico or the Virgin Islands, or in Puerto Rico and the Virgin Islands, engaged in commerce or in the production of goods for commerce, or the Administrator may appoint separate industry committees to recommend the minimum rate or rates of wages to be paid under section 6 to employees therein engaged in commerce or in the production of goods for commerce in particular industries. An industry committee appointed under this subsection shall be composed of residents of such island or islands where the employees with respect to whom such committee was appointed are employed and residents of the United States outside of Puerto Rico and the Virgin Islands. In determining the minimum rate or rates of wages to be paid, and in determining classifications, such industry committees and the Administrator shall be subject to the pro-

visions of section 8 and no such committee shall recommend, nor shall the Administrator approve, a minimum wage rate which will give any industry in Puerto Rico or in the Virgin Islands a competitive advantage over any industry in the United States outside of Puerto Rico and the Virgin Islands."

(d) No wage orders issued by the Administrator pursuant to the recommendations of an industry committee made prior to the enactment of this joint resolution pursuant to section 8 of the Fair Labor Standards Act of 1938 shall after such enactment be applicable with respect to any employees engaged in commerce or in the production of goods for commerce in Puerto Rico or the Virgin Islands.

(e) Section 6 of the Fair Labor Standards Act of 1938 is amended by adding at the end thereof the following:

"(c) The provisions of paragraphs (1), (2), and (3) of subsection (a) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands engaged in commerce or in the production of goods for commerce only for so long as and insofar as such employee is covered by a wage order issued by the Administrator pursuant to the recommendations of a special industry committee appointed pursuant to section 5 (e)."

(f) Section 6 (a) of the Fair Labor Standards Act of 1938 is amended by adding at the end thereof the following:

"(5) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term 'home worker'; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers."

Approved, June 26, 1940.

[PUBLIC LAW 49—80TH CONGRESS]

[CHAPTER 52—1ST SESSION]

[H. R. 2157]

AN ACT

To relieve employers from certain liabilities and punishments under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, and the Bacon-Davis Act, and for other purposes,

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

## PART I

### FINDINGS AND POLICY

SECTION 1. (a) The Congress hereby finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand,

(1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive wind-fall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

The Congress further finds that all of the foregoing constitutes a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce.

The Congress, therefore, further finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act be enacted.

The Congress further finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry.

The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended, as aforesaid, may (except as to liability for liquidated damages) arise with respect to the Walsh-Healey and Bacon-Davis Acts and that it is, therefore, in

the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act shall apply to the Walsh-Healey Act and the Bacon-Davis Act.

(b) It is hereby declared to be the policy of the Congress in order to meet the existing emergency and to correct existing evils (1) to relieve and protect interstate commerce from practices which burden and obstruct it; (2) to protect the right of collective bargaining; and (3) to define and limit the jurisdiction of the courts.

## PART II

### EXISTING CLAIMS

SEC. 2. RELIEF FROM CERTAIN EXISTING CLAIMS UNDER THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED, THE WALSH-HEALEY ACT, AND THE BACON-DAVIS ACT.—

(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(b) For the purposes of subsection (a), an activity shall be considered as compensable under such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable.

(c) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employed an employee there shall be counted all that time, but only that time, during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section.

(d) No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after the date of the enactment of this Act, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section.

(e) No cause of action based on unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of

1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, which accrued prior to the date of the enactment of this Act, or any interest in such cause of action, shall hereafter be assignable, in whole or in part, to the extent that such cause of action is based on an activity which was not compensable within the meaning of subsections (a) and (b).

SEC. 3. COMPROMISE OF CERTAIN EXISTING CLAIMS UNDER THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED, THE WALSH-HEALEY ACT, AND THE BACON-DAVIS ACT.—

(a) Any cause of action under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, which accrued prior to the date of the enactment of this Act, or any action (whether instituted prior to or on or after the date of the enactment of this Act) to enforce such a cause of action, may hereafter be compromised in whole or in part, if there exists a bona fide dispute as to the amount payable by the employer to his employee; except that no such action or cause of action may be so compromised to the extent that such compromise is based on an hourly wage rate less than the minimum required under such Act, or on a payment for overtime at a rate less than one and one-half times such minimum hourly wage rate.

(b) Any employee may hereafter waive his right under the Fair Labor Standards Act of 1938, as amended, to liquidated damages, in whole or in part, with respect to activities engaged in prior to the date of the enactment of this Act.

(c) Any such compromise or waiver, in the absence of fraud or duress, shall, according to the terms thereof, be a complete satisfaction of such cause of action and a complete bar to any action based on such cause of action.

(d) The provisions of this section shall also be applicable to any compromise or waiver heretofore so made or given.

(e) As used in this section, the term "compromise" includes "adjustment", "settlement", and "release".

### PART III

#### FUTURE CLAIMS

SEC. 4. RELIEF FROM CERTAIN FUTURE CLAIMS UNDER THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED, THE WALSH-HEALEY ACT, AND THE BACON-DAVIS ACT.—

(a) Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after the date of the enactment of this Act—

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

(b) Notwithstanding the provisions of subsection (a) which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(c) For the purposes of subsection (b), an activity shall be considered as compensable under such contract provision or such custom or practice only when it is engaged in during the portion of the day with respect to which it is so made compensable.

(d) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employs an employee with respect to walking, riding, traveling, or other preliminary or postliminary activities described in subsection (a) of this section, there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable within the meaning of subsections (b) and (c) of this section.

## PART IV

### MISCELLANEOUS

#### SEC. 5. REPRESENTATIVE ACTIONS BANNED.—

(a) The second sentence of section 16 (b) of the Fair Labor Standards Act of 1938, as amended, is amended to read as follows: "Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."

(b) The amendment made by subsection (a) of this section shall be applicable only with respect to actions commenced under the Fair Labor Standards Act of 1938, as amended, on or after the date of the enactment of this Act.

SEC. 6. STATUTE OF LIMITATIONS.—Any action commenced on or after the date of the enactment of this Act to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act—

(a) if the cause of action accrues on or after the date of the enactment of this Act—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued;

(b) if the cause of action accrued prior to the date of the enactment of this Act—may be commenced within whichever of the following periods is the shorter: (1) two years after the cause of action accrued, or (2) the period prescribed by the applicable State statute of limitations; and, except as provided in paragraph (c), every such action shall be forever barred unless commenced within the shorter of such two periods;

(c) if the cause of action accrued prior to the date of the enactment of this Act, the action shall not be barred by paragraph (b) if it is commenced within one hundred and twenty days after the date of the enactment of this Act unless

at the time commenced it is barred by an applicable State statute of limitations.

SEC. 7. DETERMINATION OF COMMENCEMENT OF FUTURE ACTIONS.—In determining when an action is commenced for the purposes of section 6, an action commenced on or after the date of the enactment of this Act under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, shall be considered to be commenced on the date when the complaint is filed; except that in the case of a collective or class action instituted under the Fair Labor Standards Act of 1938, as amended, or the Bacon-Davis Act, it shall be considered to be commenced in the case of any individual claimant.—

(a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or

(b) if such written consent was not so filed or if his name did not so appear—on the subsequent date on which such written consent is filed in the court in which the action was commenced.

SEC. 8. PENDING COLLECTIVE AND REPRESENTATIVE ACTIONS.—The statute of limitations prescribed in section 6 (b) shall also be applicable (in the case of a collective or representative action commenced prior to the date of the enactment of this Act under the Fair Labor Standards Act of 1938, as amended) to an individual claimant who has not been specifically named as a party plaintiff to the action prior to the expiration of one hundred and twenty days after the date of the enactment of this Act. In the application of such statute of limitations such action shall be considered to have been commenced as to him when, and only when, his written consent to become a party plaintiff to the action is filed in the court in which the action was brought.

SEC. 9. RELIANCE ON PAST ADMINISTRATIVE RULINGS, ETC.—In any action or proceeding commenced prior to or on or after the date of the enactment of this Act based on any act or omission prior to the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

SEC. 10. RELIANCE IN FUTURE ON ADMINISTRATIVE RULINGS, ETC.—

(a) In any action or proceeding based on any act or omission on or after the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged.

Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

(b) The agency referred to in subsection (a) shall be—

(1) in the case of the Fair Labor Standards Act of 1938, as amended—the Administrator of the Wage and Hour Division of the Department of Labor;

(2) in the case of the Walsh-Healey Act—the Secretary of Labor, or any Federal officer utilized by him in the administration of such Act; and

(3) in the case of the Bacon-Davis Act—the Secretary of Labor.

SEC. 11. LIQUIDATED DAMAGES.—In any action commenced prior to or on or after the date of the enactment of this Act to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16 (b) of such Act.

SEC. 12. APPLICABILITY OF "AREA OF PRODUCTION" REGULATIONS.—No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of an activity engaged in by such employee prior to December 26, 1946, if such employer—

(1) was not so subject by reason of the definition of an "area of production", by a regulation of the Administrator of the Wage and Hour Division of the Department of Labor, which regulation was applicable at the time of performance of the activity even though at that time the regulation was invalid; or

(2) would not have been so subject if the regulation signed on December 18, 1946 (Federal Register, Vol. 11, p. 14648) had been in force on and after October 24, 1938.

SEC. 13. DEFINITIONS.—

(a) When the terms "employer", "employee", and "wage" are used in this Act in relation to the Fair Labor Standards Act of 1938, as amended, they shall have the same meaning as when used in such Act of 1938.

(b) When the term "employer" is used in this Act in relation to the Walsh-Healey Act or Bacon-Davis Act it shall mean the contractor or subcontractor covered by such Act.

(c) When the term "employee" is used in this Act in relation to the Walsh-Healey Act or the Bacon-Davis Act it shall mean any individual employed by the contractor or subcontractor covered by such Act in the performance of his contract or subcontract.

(d) The term "Walsh-Healey Act" means the Act entitled "An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes", approved June 30, 1936 (49 Stat. 2036), as amended; and the term "Bacon-Davis Act" means the Act entitled "An Act to amend the Act approved March 3, 1931, relating to the rate of wages for laborers and mechanics employed by contractors and subcontractors on public buildings", approved August 30, 1935 (49 Stat. 1011), as amended.

(e) As used in section 6 the term "State" means any State of the United



States or the District of Columbia or any Territory or possession of the United States.

SEC. 14. SEPARABILITY.—If any provision of this Act or the application of such provision to any person or circumstance is held invalid, the remainder of this Act and the application of such provision to other persons or circumstances shall not be affected thereby.

SEC. 15. SHORT TITLE.—This Act may be cited as the “Portal-to-Portal Act of 1947”.

Approved May 14, 1947.

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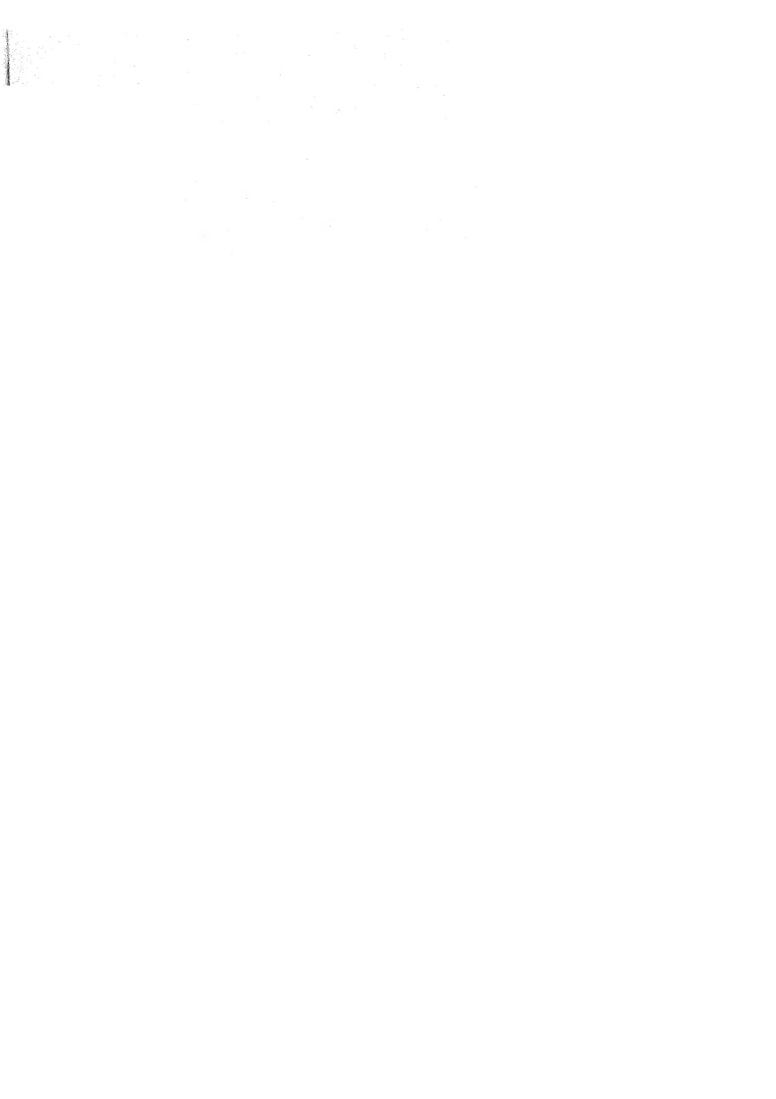
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